TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 627.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

THE NEW RIVER COMPANY, WHITE OAK FUEL COMPANY, STUART COLLIERY COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

FILED NOVEMBER 6, 1923.

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1 In the District Court of the United States for the Southern District of West Virginia, at Charleston.

THE NEW RIVER COMPANY, A CORPORATION, WHITE OAK Fuel Company, a corporation, Stuart Colliery Company, a corporation, Dunnloop Coal & Coke Company, a corporation, Beckley Coal & Coke Company, a corporation, Mabscott Coal & Coke Company, a corporation, Cranberry Fuel Company, a corporation, plaintiffs,

versus

THE CHESAPEAKE & OHIO RAILWAY COMPANY, A CORPORATION, The Virginian Railway Company, a corporation, and the United States of America and the Interstate Commerce Commission, defendants; and Slab Fork Coal Company, a corporation, Scotia Coal & Coke Company, a corporation, South Side Company, a corporation, Turkey Knob Coal Company, a corporation, Coal Run Coal Company, a corporation, Branch Coal Company, a corporation, Beechwood Coal and Coke Company, a corporation, Greenwood Coal Company, a corporation, Laurel Creek Coal Company, a corporation, Quinnimont Coal Company, a corporation, Maryland-New River Coal Company, a corporation, Star Coal & Coke Company, a corporation, Ephriam Creek Coal & Coke Company, a corporation, and Stover Coal Company, a corporation, intervening defendants. } In Equity.

[Caption omitted.]

2 [Title omitted.]

BILL OF COMPLAINT AS AMENDED.

To the Honorable the Judges of the District Court of the United States for the Southern District of West Virginia Sitting in Equity.

I.

3 Your complainants, the New River Company, White Oak Fuel Company, Stuart Colliery Company, Dunnloop Coal & Coke Company, Beckley Coal & Coke Company, Mabscott Coal & Coke Company, Cranberry Fuel Company, all West Virginia corporations, bring this proceeding in equity against the Chesapeake and Ohio Railway Company, a corporation, and the Virginian Railway Company, a corporation, for the purpose of enjoining, preventing and restraining them from applying a certain rule

for distributing coal cars at the mines of your complainants and others similarly circumstanced, known as rule 4 of Circular CS–31, revised, in violation of their common law obligation as common carriers to furnish transportation in interstate commerce upon terms and conditions as favorable as those given by said common carriers, and each of them, for like traffic under similar conditions to other shippers and of the same obligation as defined in the interstate commerce act, approved February 4, 1887 (24 Stat. L. 379), as amended, including the amendments to said interstate commerce act contained in the transportation act, 1220, approved February 28, 1920 (41 Stat. L. 456).

And against the United States and the Interstate Commerce Commission to enjoin, set aside and annul the decision, ruling and order of the Interstate Commerce Commission issued under date of December 11, 1922, in proceedings brought by your complainants and designated as New River Company et al. vs. The Chesapeake and Ohio Railway Company, Interstate Commerce Commission Docket No. 12083, and New River Company et al. vs. The Virginian Railway Company, Interstate Commerce Commission Docket No. 12084, and the order of the Interstate Commerce Commission issued under date of April 15, 1920, upon the commission's own motion in the regulation of car service in so far as said decisions, rulings and orders

of the Interstate Commerce Commission authorize or require
4 the said carriers, defendant herein, to publish and apply the
rule of car distribution aforesaid, which said decisions, rulings and orders of the Interstate Commerce Commission were and are in excess of its statutory powers and were and are arbitrary and without warrant of law and, therefore, void.

And in support hereof your complainants allege and show:

II.

Your complainant, the New River Company, is a corporation of the State of West Virginia which controls, by stock ownership of all of the stock, the other corporations herein joined with it as complainants, to wit:

White Oak Fuel Company, a corporation of the State of West Virginia, operating bituminous coal mines within the said State, known as Scarbro, Whipple and Oakwood, which said mines are served severally by each of said carriers defendant herein in the transportation of goods, including coal and coke, in interstate commerce;

Stuart Colliery Company, a corporation of the State of West Virginia, operating bituminous coal mines within said State, known as Summerlee and Lochgelly, which said mines are served severally by each of said carriers defendant herein in the transportation of goods, including coal and coke, in interstate commerce;

Dunnloop Coal & Coke Company, a corporation of the State of West Virginia, operating a bituminous coal mine within the said

State, known as Dunnloop, which said mine is served severally by each of said carriers defendant herein in the transportation of goods, including coal and coke, in interstate commerce;

Beckley Coal & Coke Company, a corporation of the State
5 of West Virginia, operating a bituminous coal mine within said State, known as Beckley, which said mine is served severally by each of said carriers defendant herein in the transportation of goods, including coal and coke, in interstate commerce;

Mabscott Coal & Coke Company, a corporation of the State of West Virginia, operating a bituminous coal mine within said State, known as Mabscott, which said mine is served severally by each of said carriers defendant herein in the transportation of goods, including coal and coke, in interstate commerce;

And Cranberry Fuel Company, a corporation of the State of West Virginia, operating three bituminous coal mines within said State, known as Cranberry No. 1, Cranberry No. 2 and Cranberry No. 3, all in the State of West Virginia, which said mines are each of them served severally by each of the carriers defendant herein in the transportation of goods, including coal and coke, in interstate commerce.

III.

The Chesapeake and Ohio Railway Company, defendant herein, is a corporation of the State of Virginia, having its usual place of business in the State of West Virginia, engaged as a common carrier in the transportation of passengers and property, including coal, wholly by railroad between points in the State of West Virginia, including the locality of the mines of your complainants, and points in various other States, in interstate commerce and as such common carrier is subject to the provisions of the act of Congress approved February 4, 1887, known as the interstate commerce act, and of acts amendatory thereto and supplementary thereof, including the act known as the transportation act, 1920, approved February 28, 1920.

6 IV.

The Virginian Railway Company, defendant herein, is a corporation of the State of Virginia, having its usual place of business in the State of West Virginia, engaged as a common carrier in the transportation of passengers and property wholly by railroad between points in the State of West Virginia, including the mines of your complainants aforesaid and points in various other States in interstate commerce, and, as such common carrier, is subject to the provisions of the interstate commerce act, approved February 4, 1887, and acts amendatory thereto and supplementary thereof, including the act known as the transportation act, 1920, approved February 28, 1920.

V.

The Chesapeake and Ohio Railway Company and The Virginian Railway Company are independent common carriers each having access by its own rails or through trackage rights to the mines of your complainants and each of them and are engaged in the carriage of the coal, coke and other goods in competition as such carriers from said mines to the Atlantic seaboard and other points of destination in other States in interstate commerce.

VI.

The mines of your complainants aforesaid are located in Fayette and Raleigh Counties, West Virginia, in the heart of a field of bituminous coal production wherein is mined and produced a low volatile bituminous coal known as semianthracite or smokeless coal of West Virginia. In addition to the mines of your com-
7 plainants aforesaid there are many other mines in the State of West Virginia producing the same quality of coal served in interstate commerce in some cases by both lines of railroad and in very many other cases served singly by one or the other of the carriers defendant herein. All of said mines, whether local to one line of railroad or served by each of them, are in active competition in the marketing in other States of smokeless coal produced and mined in West Virginia and transported in interstate commerce by said The Chesapeake and Ohio Railway Company and said The Virginian Railway Company; the said coal areas wherein said smokeless coal is produced are known locally on the lines of the defendant carriers as the New River district.

VII.

The Interstate Commerce Commission is the administrative tribunal created by said interstate commerce act for the administration thereof, and whose authority, powers and limitations are in said act defined.

VIII.

The provisions of the interstate commerce act apply to common carriers engaged in the transportation of passengers or property in interstate commerce wholly by railroad or partly by railroad and partly by water when both are used under a common control management or arrangement for a continuous carriage or shipment. (Paragraph 1–A, Section I.)

The term " transportation," as used in the interstate commerce act, includes locomotives, cars and other vehicles, vessels, and all instrumentalities or facilities of shipment or carriage, irrespective
8 of any ownership or contact, express or implied, for the use thereof, and all services in connection with the receipt, de-

livery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported. (Paragraph 3 of Section I.)

By the interstate commerce act it is provided that it shall be the duty of every common carrier subject to the act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor and to establish through routes and just and reasonable rates, fares and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes. (Paragraph 4 of Section I.)

By the interstate commerce act it is made the duty of all common carriers to establish, observe and enforce * * * just and reasonable regulations and practices affecting * * * the facilities for transportation * * * and all other matters relating to or connected with the receiving, handling, transportation, storing and delivery of property subject to the provisions of this act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation and delivery of property subject to the provisions of this act upon just and reasonable terms and every unjust and reasonable clasification, regulation and practice is prohibited and declared to be unlawful. (Paragraph 6 of Section I.)

The term "car service" in the interstate commerce act is defined to include the use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars and other vehicles used in the transportation of property * * * by any carrier by railroad subject to this act. (Paragraph 10 of Section I.)

9 It is provided by the interstate commerce act that it shall be the duty of every carrier by railroad subject to this act to furnish safe and adequate car service and to establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service, and every unjust and unreasonable rule and regulation with respect to car service is prohibited and declared to be unlawful. (Paragraph 11 of Section I.)

It is provided by the interstate commerce act that it shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines, or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. (Paragraph 12 of Section I.)

By the interstate commerce act the Interstate Commerce Commission is authorized, by general or special orders, to require all carriers by railroad subject to this act, or any of them, to file with it from time to time their rules and regulations with respect to car

service and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares and charges for transportation, and be subject to any or all of the rules relating thereto. (Paragraph 13 of Section I.)

By the interstate commerce act it is provided that the commission may, after hearing on a complaint, or upon its own initiative without complaint, establish reasonable rules, regulations and practices with respect to car service by carriers by railroad subject to this act, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations or practices. (Paragraph 14 of Section I.)

By the interstate commerce act it is provided that it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatever or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (Paragraph 1 of Section III.)

By the interstate commerce act it is provided that nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute but the provisions of this act are in addition to such remedies. (Section 22; 22 Stat. L. 379.)

The obligations of carriers with respect to the distribution of cars are further defined in the interstate commerce act in connection with the provision for an additional remedy to enforce such obligation, as follows:

"That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the Act to which this is a supplement and all Acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: Provided, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question

of fact: Provided, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this Act or the Act to which it is a supplement." (Section 23; 25 Stat. L. 855.)

IX.

Pursuant to the provisions of said interstate commerce act, in last preceding article set out, each of carriers defendant herein for many years has established and applied rules for the distribution of its coal cars among its shippers during recurring periods when the supply of cars available for distribution for transportation of coal among the coal mines served by it did not equal the requirements of such mines, which said rules provided for the ratings of said mines and the distribution of cars to them so that each mine served by said carrier in the region should receive its just and reasonable proportion of the cars available on said railroad for distribution to the coal mines served by it. Prior to Federal control during the period of the war each of the defendant carriers, by its rules, provided for the rating and distribution of its cars among the mines wtihout reference to the car supply that was furnished by any other
12 carrier. The ratings of all mines under said rules represent, for purposes of car distribution, the daily capacity of the mines to produce and ship coal.

X.

By proclamation, dated December 26, 1917, the President took possession and assumed control of the railroads of the carriers defendant herein and operated the same through the Director General of Railroads from January 1, 1918, to and including February 29, 1920. Under said proclamation the railroads of the United States were permitted to be operated and were operated under the control and direction of the United States solely according to war needs, and so far as the United States might choose in combination as if they constituted a single carrier, regardless of the obligations of said roads when operated as independent and competing carriers according to the law when not under such Federal control. During the period of said Federal control the Director General of Railroads published and put in force through his car service section, and applied rules for the rating of coal mines other than anthracite and for the distribution of available empty cars to said mines. The said rules were contained in a circular of said car service section known as Circular CS–31. Rule 2 of said Circular CS–31 provided:

"Copies of orders for cars for a mine that is joint with any other carrier (steam, electric or water) shall be filed with the designated representative of each such carrier, such combinations of orders must not exceed the gross daily rating of the mine."

The rules contained in the circular aforesaid were subsequently revised and republished and put in force in Circular CS–31
13 revised, effective January 10, 1919. In said Circular CS–31, revised, the rule that had theretofore applied as rule 2 in the original circular was republished and put in force and applied without change in verbiage but was designated as rule 4 of the rules for the distribution of cars to coal mines in CS–31, revised.

Said rule 4, as contained in said Circular CS–31, revised, was continued in force and applied by the Director General of Railroads to the end of Federal control. Copy of the said Circular CS–31, revised, is hereto appended as Appendix A.

XI.

On February 29, 1920, the railroads of the United States were released from the Federal control under said proclamation of the President; by circular dated March 2, 1920, the Interstate Commerce Commission recommended that the carriers, both those defendant herein and all others subject to the interstate commerce act, continue in force the said Circular CS–31, revised, until such time as the experience of the carriers or the commission should dictate other and more appropriate rules for the rating and distribution of cars to coal mines; and in accordance with and in compliance with said action of the commission, the rules of said circular were continued in force by the carriers defendant herein.

Under date of April 15, 1920, the Interstate Commerce Commission, acting under its emergency powers, as defined in paragraph 15 of Section I of the interstate commerce act, ordered and directed the carriers to modify one of the rules contained in said Circular CS–31, revised, which said modification is not here involved, but otherwise recommended that the other rules of said circular, including
14 rule 4 aforesaid, be continued in force and applied, and in accordance with and in compliance with said action of the commission, the rules of said circular were continued in force by the carriers defendant herein.

XII.

On or about July 8, 1920, the carriers defendant herein applied to the Interstate Commerce Commission for permission to abrogate rule 4 and to put into effect the rule laid down in the Illinois case.

This application was refused by the commission and because of said refusal said rule 4 was continued in effect by the carriers defendant herein.

Thereafter on, to wit, January 11, 1921, your complainants filed complaints before the Interstate Commerce Commission separately against the Chesapeake and Ohio Railway Company and the Virginian Railway Company, respectively, alleging that said rule 4 of Circular CS–31, revised, was unjust and unreasonable in violation of Section I of the interstate commerce act as amended, par-

ticularly paragraphs 11 and 12 of said Section I, and unduly preferential of complainant's competitors and prejudicial of complainants in violation of Section III of said act. These two cases are known, respectively, as Interstate Commerce Commission Docket Nos. 12083 and 12084. The above numbered separate complaints were consolidated with each other and certain other similar complaints, known as Interstate Commerce Commission Dockets Nos. 12081 and 12082, and were assigned for hearing, brief, and argument and decision to Division V of the commission; were duly briefed, heard, and argued before said commission and the decision of the commission thereupon was issued by said Division V on
15 June 21, 1921, Fairmont and Cleveland Coal Company vs. B. & O. R. R. Co. (62 I. C. C., 269). Copy of said decision is hereto appended as Appendix B.

In said decision the commission found that said rule 4 of Circular CS–31, revised, was unjust and unreasonable and unduly prejudicial of complainants and others similarly circumstanced and unduly preferential of the mines on each of the carriers defendant herein that were served singly by each such carrier; held and found that a certain rule laid down in the case of In re Irregularities in Mine Ratings (25 I. C. C. 286), known as the Illinois case, was the just and proper rule and, while stating "We have not required that car service rules be filed as tariff schedules," directed as follows: "We shall expect, however, that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us."

XIII.

The commission in said decision found that a certain rule of car distribution, in lieu of said rule 4 of Circular CS–31, revised, to wit, the rule of the Illinois case, would be just and reasonable, and authorized and directed the carriers to establish and apply said rule in the future. This rule, so authorized and directed, limited the right of your complainants on days when they ordered cars from both their connections to order from each only 75 per cent of the mine rating. In reliance on and pursuant to such authority and direction the carriers defendant herein amended their car service rules so as to conform with said findings of the commission and filed the said Illinois rule of car distribution. By said action of the commission said rule 4 was abrogated and the Illinois rule came for the time being into effect as the rule prescribed by the commission.

16

XIV.

Complaints substantially similar to those involved in Dockets 12081–12084 were filed by certain operators of mines, similarly circumstanced, located in Illinois and Indiana, against carriers serving mines in those States, which said complaints were known as Inter-

state Commerce Commission Dockets Nos. 12362 and 12399, respectively, and are collectively known as Bell & Zoller Coal Company et al. vs. Baltimore & Ohio Southwestern Railroad Company et al. Hearing was duly had upon said latter numbered complaints and a tentative report upon such record was made by an examiner of the commission in which it was proposed to confirm the decision in the Fairmont & Cleveland Coal Company cases, Dockets Nos. 12081–12084. Petition had in the meantime been filed to reopen for further consideration Dockets Nos. 12081–12084 and the commission did reopen said cases and consolidate the same for argument with the records made in the Bell & Zoller Coal Company cases. Argument was had upon the records thus consolidated in all of these cases before the commission, and on December 11, 1922, the commission entered its decision, ruling, and order, copy of which is hereto appended as Appendix C. Said decision is known as Bell & Zoller Coal Company et al. vs. Baltimore & Ohio Southwestern Railroad Company et al., which case includes the cases, Dockets Nos. 12081–12084, and will hereinafter be referred to as the Bell & Zoller decision. In its decision, ruling, and order (Appendix C) the Interstate Commerce Commission found, in reversal of its previous decision, ruling, and order, that rule 4 of Circular CS–31, revised, was not "in principle unjust or unreasonable or unduly prejudicial" and that "our former conclusions in the Fairmont cases—are reversed,"
and the Commission entered an order to dismiss the com-
17 plaints in all of the cases recited in which an abrogation of said rule 4 had been sought and previously granted. By thus reversing its previous conclusions and directions in the Fairmont case the commission annulled as of the date of December 11, 1922, its previous action by which it abrogated rule 4 and substituted the Illinois rule therefor, and thereby, by its own action, reestablished rule 4 as the rule to be followed by the railroads. In its decision the commission found inter alia:

"The operation of rule 4 is shown by the following example: A joint mine with a gross daily rating of 50 cars located on carriers A and B orders all of its cars from carrier A which has an 80 per cent car supply. The joint mine will receive the same number of cars as a local mine with a daily rating of 50 cars on carrier A. However, if carrier B has a 50 per cent car supply and the joint mine divides its order equally between the two carriers it will receive 80 per cent of 25 cars, or 20 cars, from carrier A, and 50 per cent of 25 cars, or 12.5 cars, from carrier B, a total of 32.5 cars, compared with 40 cars received by the local mine on carrier A. Should the joint mine order more than half its cars from the carrier with the greater car supply this will change the figures somewhat, but in no instance will the joint mine receive as many cars as the local mine served by carrier A if the orders are divided. The complainants concede that the joint mine will, in the aggregate, receive more cars than the local mine located on the carrier with the

lesser car supply, and it possibly may receive more cars on the average than the local mines of similar rating on both carriers."

By said decision, order, and ruling of the commission each of the carriers defendant herein is authorized and required to limit its car service to your complainants, and others similarly circumstanced, below the car service which it furnishes to the local mines served by it, as in said commission's report set out, and said limitation of obligation is arrived at, as to each carrier, by reason of car service and transportation furnished to your complainants, and others similarly circumstanced by another independent and competing carrier.

Under said decision, order, and ruling if any of your complainants in time of car shortage has availed itself of its right of shipment by the carrier which has the largest available percentage of car supply, to ship so much of its coal as said carrier can take, and then desires to ship the remainder of its goods by the other independent and competing carrier, said other carrier is prohibited from giving any transportation service whatever to said complainant solely because of the first carrier having taken a portion of the goods which your complainant has desired to ship by it. Thus if one of your complainants desires to ship all its coal to the Atlantic seaboard by one of said carriers and orders cars therefor, and said carrier, by reason of having only an 80 per cent car supply is able to transport only 80 per cent of said coal, the other of said carriers on whose line complainant is located, and which has a 40 per cent car supply and by whom your complainant desires to ship the balance of its coal to the Atlantic seaboard, is prohibited from giving any transportation service to your complainant although to other shippers located on its road, desiring to ship coal by it it is giving a 40 per cent service.

XV.

Acting under and because of said decision, order, and ruling of the commission of December 11, 1922, and as your complainants are informed and believe and therefore allege, in fear and duress of the penalties imposed by law in case of violation of any decisions, orders, or rulings which the commission is authorized to make, the carriers, defendant herein, have put in force, and notified your complainants that they have put in force, rule 4 of Circular CS–31, revised, effective in the case of the Chesapeake and Ohio Railway Company on February 10, 1923, and in the case of the Virginian Railway Company on February 1, 1923.

XVI.

On, to wit, January 11, 1923, your complainants, joined with certain other operators of coal mines similarly circumstanced, filed with the Interstate Commerce Commission a petition to reopen said proceedings known as Dockets 12081–12084, inclusive, but the Inter-

state Commerce Commission has failed to take any action thereon and the decision, ruling, and order made December 11, 1922, and the action of the carriers defendant herein putting in force, effective February 1 and February 10, respectively, said rule 4 continue in full force and unmodified.

XVII.

The mines of your complainants are in large part deep shaft mines which required for their opening and development a large capital investment much in excess of that required for the opening or development of the ordinary drift or slope mine; said shaft mines carry a large overhead charge and by reason of the capital expenditure required in their development and said large overhead charge are peculiarly dependent for successful and profitable operation upon continuous and steady operation at or near their capacity and upon transportation facilities and service which will permit of this.

20 The properties where said mines were developed lay between the locations of the Chesapeake and Ohio and the Virginian Railways and were readily capable, by the building of short railroad lines, of being brought into connection with both of said trunk lines. An investment of large sums was made in the development of said mines and the building by the investors therein of two railroads, to wit, the White Oak Railway and the Piney River and Paint Creek Railroad, to connect the mines with both trunk lines in reliance on the geographical location of said properties being such that they were capable of being served and would be entitled to be served by both of said lines, and in reliance on securing, by the full service of each of said lines as a competing and independent carrier, the transportation facilities which were essential to the successful operation of the properties. In 1917 after said White Oak Railway and Piney River and Paint Creek Railroad had been operated for a period of five years by the Chesapeake and Ohio and the Virginian as joint lessees, during which time the mines located in the leased lines had had from each of said lessors full transportation service free from the restrictions as to such service now imposed by said rule 4, said railroads were, at the solicitation of the trunk lines, sold and conveyed one to the Chesapeake and Ohio Railway Company and the other to the Virginian Railway Company with full reciprocal trackage rights for a period of 99 years granted by each purchasing trunk line to the other trunk line, thereby assuring for said period of 99 years full access by both trunk lines to the mines located on each of the purchased roads. The stock of both the White Oak Railway Company and the Piney River & Paint Creek Railroad Company, as well as the stock of the complainant mining companies whose properties had been developed and connected with the trunk lines by the construction of said railroads, was then owned by

21 the New River Company as it had previously been by the New River Fuel Company, of which the New River Company was the successor.

In order to assure to the mines located on said roads the continued full service of both of said trunk lines essential to their successful operation, it was stipulated by the New River Company that as part of the consideration for said sale an agreement should be entered into by the Chesapeake and Ohio Railway Company and the Virginian Railway Company, respectively, with the New River Company that the trackage rights to be reciprocally granted by each purchasing trunk line to the other trunk line over the railroads purchased should be maintained in full force and effect for said period of 99 years, and that all the terms of said trackage agreements should during said period be fully performed and observed by the trunk lines; it was also stipulated that the proposed agreement of purchase and sale, including said agreement with the New River Company as to the continuance of the trackage agreement, and said trackage agreement itself, should not go into effect until they had been submitted to the Interstate Commerce Commission for its consideration and formal or informal approval. All of said agreements were so submitted, and the Interstate Commerce Commission making no objection thereto, the sale was consummated in accordance with said agreements. By said agreement entered into by said The Chesapeake and Ohio Railway Company and the Virginian Railway Company the right was vested in the New River Company to the continuance of the full service of said carriers over said road to the mines and properties located thereon. The denial of said service by either of said carriers on account or by reason of certain shipments having been made over the other of said carriers, constitutes an unlawful
22 denial of the service which by said agreement was intended to be secured and was secured to The New River Company for the mines located on said purchased railroads.

XVIII.

There is at the present time a shortage of cars on both the defendant carriers, neither having currently a supply of cars available for the loading and transportation of coal equal to the requirements therefor of the mines served by it, including the mines of your complainants.

XIX.

If said carriers furnish cars only in accordance with said decision, ruling, and order of December 11, 1922, and said rule 4 of CS–31, revised, the supply of cars so furnished will be entirely inadequate to transport the coal which the mines of your complainants have been developed to produce and are producing and which they have available for shipment and desire to ship.

XX.

Your complainants desire to use each defendant carrier to ship in interstate commerce the full amount of coal which said carrier can

receive and transport for your complainants on a parity with others offering a similar amount of tonnage to said carrier for such shipment, and your complainants and each of them are prepared to ship and desire to ship by each of said carriers coal in excess of the amount which said carrier can transport on such a parity. Your complainants are prepared to pay and offer to pay in the manner provided by law the freight charges on all coal which the defendant carriers will accept for shipment.

23 XXI.

Said decision, ruling, and order of the Interstate Commerce Commission of December 11, 1922, and said rule 4 put into effect by the defendant carriers in compliance therewith, constitutes an encroachment upon and a curtailment and denial of the legal right of your complainants and each of them to the service of a common carrier in interstate commerce on a parity with other shippers offering similar shipments to said carrier and of the carrier's legal duty and legal and property rights as a common carrier to serve your complainants as such common carrier and deprives your complainants, and each of them, of their property and legal rights without due process of law and of the equal protection of the laws assured by the constitutions and laws of Virginia, of West Virginia, and of the United States.

XXII.

Said decision, ruling, and order and said rule 4 are discriminatory against your complainants and each of them as producers and shippers of a certain particular commodity, to wit, coal, as against shippers of other classes of merchandise who, throughout the United States, when by their geographical location they are able to ship by more than one common carrier, have and enjoy the right of service as to transportation of goods which they desire to ship by and offer for shipments to one of said carriers on a parity with other shippers offering similar shipments by said carrier, which said service they have and enjoy regardless of what shipments may have been made of other goods by another carrier.

24 XXIII.

Said decision, ruling and order of December 11, 1922, and said rule 4 imposes the obligation on a common carrier to inquire and ascertain what shipments have been made in interstate commerce by a shipper through another and independent and competing carrier and, if a certain amount of coal has been shipped by said independent and competing carrier, entirely to deny and refuse any transportation in interstate commerce to the shipper tendering goods for shipment, or partly to deny and refuse such transportation if some shipments have been made by such other competing carrier, thereby permitting and requiring such carrier to discriminate against a shipper who has made use of a competing common carrier and in favor of a

shipper who deals exclusively with one of the competing carriers, and such discrimination is contrary to the laws of the United States and of the States of Virginia and West Virginia.

XXIV.

Said decision, ruling and order of December 11, 1922, authorizes and requires each of two competing and independent common carriers, when a certain particular commodity, to wit, coal, is produced and offered for shipment to any extent in excess of what the car supply of such carriers makes it possible for them to transport, to cease to act as a separate and independent carrier and to cease as such to furnish to shippers tendering goods to it equal and proportionate service according to the goods offered to it and the cars which it has available and authorizes and requires the two competing and independent carriers to act in combination one with the other, and, in such combination together, to give to the shipper only such
25 service as he would be entitled to if the two independent carriers were in fact a single corporate carrier; and, if one of said carriers has transported a certain amount of goods for the shipper, authorizes and requires the other carrier to refuse any transportation of goods tendered to it. It is contrary to the laws of the United States and of the States of Virginia and West Virginia for two independent and competing carriers thus to combine to limit the facilities which, as common carriers, they will afford to shippers tendering to them separately as independent common carriers goods to be shipped; there is no power vested by law in the Interstate Commerce Commission to authorize or require by a decision, ruling or order two railroads which are independent and competing carriers serving the same territory, to thus act and operate in combination, and in such combination so to limit facilities which a shipper offering for shipment goods to them separately as independent carriers is by law entitled to; and such combination and limitation is in violation of the laws and statutes of the United States and of the States of Virginia and West Virginia and constitutes under said laws and statutes an illegal combination in restraint of trade and commerce and of interstate trade and commerce, and it is a violation and denial of the legal right of each of your complainants to deal with an independent common carrier as such, and to have transportation from each such carrier without discrimination because of other shipments which it has made by another separate and independent common carrier.

XXIV.

The Interstate Commerce Commission has by said decision, ruling and order of December 11, 1922, attempted to curtail and deny the legal right of a shipper to transportation service in interstate
26 commerce from a common carrier on a parity with other shippers offering similar goods for shipment, for the purpose of

bringing about what a majority of said commission now conceives to be a desirable adjustment of labor conditions as between different mines; no authority is vested by law in said commission to adjust mine labor conditions or to use its powers of regulation of railroads and common carriers, directly or indirectly, for any such purpose; said decision, ruling and order of the commission is in fact arbitrary, unjust, and unreasonable in its effect upon mine labor conditions in that it will, in times of car shortage as compared with times of full car supply, disproportionately affect and curtail the production of mines accessible to two or more carriers as compared with those accessible to only one carrier, thereby disorganizing the labor and production organization of said mines accessible to and customarily availing themselves of the services of two or more carriers, and if allowed to take effect will seriously curtail production of coal in the United States in that, through the great variation which it arbitrarily and artificially imposes on the production of mines which are so located as to be accessible to two or more roads and which normally use and have been developed to use the transportation service of said two or more roads, it will demoralize the labor and production organization of such mines so as to render it impossible for them to retain a working force and organization proportional to their normal capacity and output.

XXVI.

It is a common law, statutory and property right of each of your complainants to have goods which it desires to have shipped by a common carrier in interstate commerce accepted and received
27 for transportation without discrimination as to transportation and car supply between it and other shippers desiring to have similar goods shipped by the same carrier and there is a reciprocal legal duty and obligation on the carrier, regardless of what shipments the shipper may have made of other goods over another competing road, to receive and ship the goods offered by a shipper on a parity with other parties so offering goods to it for shipment and without discrimination between parties so tendering such shipments; if your complainants are deprived of the transportation rights to which they are entitled their investments and property in the mines owned by them and which are dependent on such transportation will be lost or seriously impaired.

XXVII.

No right or power is by law vested in the Interstate Commerce Commission to deprive a shipper of his right, on a parity with others offering goods for shipment, to the service of a common carrier, or to prohibit the carrier from performing such service, and the decision, ruling and order of December 11, 1922, of the Interstate Commerce Commission and the denial by the Chesapeake and Ohio Railway

Company and the Virginian Railway Company, under duress of said decision, ruling and order made by the Interstate Commerce Commission as hereinbefore stated, of service in interstate commerce to your complainants on a parity with other shippers is without warrant in law.

XXVIII.

The curtailment in accordance with said decision, ruling and order of December 11, 1922, and said rule 4 of the said transportation service in interstate commerce of the defendant carriers to your complainants and each of them, will, if said decision, ruling, order and rule are permitted to operate, result in great loss and irreparable damage to your complainants and each of them and your complainants have no plain, sufficient and adequate remedy at law and can have adequate relief only through the exercise of the equity powers of this honorable court.

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XXIX.

Your complainants and each of them are organized as to capital investment, mine development, supplies and equipment, working capital, administrative organization, labor force, housing facilities and selling organization to mine, handle and market the full amount of coal which, with the full service of each of said defendant carriers as an independent and competing carrier without discrimination between your complainants and other shippers offering shipments to said carriers, your complainants are entitled to by reason of the geographical location of their mines and the access of each of said carriers thereto; and your complainants have entered into contracts for the sale of coal based on the output which the furnishing of such facilities would enable them to transport and market. Said investment and organization have been made and said contracts have been entered into by your complainants and each of them in reliance on the transportation which they are lawfully entitled to from each of the carriers defendant and which they have uninterruptedly had and enjoyed for a long period of years, except during the period of Federal control when the railroads of the United States, including those of the defendant carriers, were operated as a unit solely according to war needs, and for a short period after the termination of said period of Federal control, during which said rule 4 was permitted by the Interstate Commerce Commission to remain in force, and except as the car supply of your complainants was by the original decision in the Fairmont case restricted slightly in comparison with the restriction now attempted to be imposed. If said rule 4, CS–31, revised, is permitted to be applied your complainants will suffer great and irreparable damage in the loss of returns on their investment, wastage and disuse of their equipment, wastage and lack of use for their houses and supplies, laying off, demoralization and loss of their labor force,

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lack of employment and demoralization of their selling organization, loss of the profits under existing contracts by reason of inability to deliver the coal contracted to be delivered thereunder, damage claims for nondelivery, and loss of sale of coal and contracts of sale which, except for the denial and refusal of the transportation facilities to which they are entitled, your complainants are in position to make.

I. Wherefore, your complainants, and each of them, pray: That there be ordered and granted by the court a temporary stay or suspension of the operation of said decision, ruling and order of December 11, 1922, of the Interstate Commerce Commission and of said rule 4 of Circular CS–31, revised.

II. That a temporary or interlocutory injunction be issued, restraining and enjoining, until the further order of this court, the United States of America and the Interstate Commerce Commission from enforcing or applying said decision, ruling and order of December 11, 1922, and said United States of America and Interstate Commerce Commission and said The Chesapeake and Ohio Railway Company and the said The Virginian Railway Company, and each of them, from enforcing or applying said rule 4 of Circular CS–31, revised, or from restricting the supply of cars to your complainants, or any of them, in accordance with said rule.

III. That this court adjudge, order, and decree that rule 4 of Circular CS–31, revised, now published by the carriers defendant herein, effective as of February 1, 1923, and February 10, 1923, respectively, is in violation of the legal rights of your complainants, and each of them, to transportation service from each of said carriers in interstate commerce and is null and void and without warrant in law, and that same be set aside and annulled.

IV. That this court adjudge that the decision, order, and ruling of the Interstate Commerce Commission of December 11, 1922, in so far as it authorizes or requires the carriers defendant herein to put in operation said rule 4 of Circular CS–31, revised, or to restrict the transportation service and the furnishing of cars by said carriers in interstate commerce and is null and void and without war- of December 11, 1922, or in accordance with said rule 4 of Circular CS–31, revised, is beyond the lawful right or authority of the United States of America and the Interstate Commerce Commission and is without warrant in law and is null and void, and that said decision, order, and ruling of December 11, 1922, and said rule 4 of Circular CS–31, revised, is beyond the lawful right or authority of the United

V. That the United States of America and the Interstate Commerce Commission and the carriers defendant, each and all, be perpetually restrained and enjoined from restricting, in accordance with said decision, ruling, and order of December 11, 1922, of the Interstate Commerce Commission and with rule 4 of Circular CS–31, revised, of the transportation service in interstate commerce and of said carriers defendant to your complainants and from so restrict-

ing the said service by or through any other decision, ruling, order, or rule to the same effect.

31 VI. That your complainants, and each of them, may have such other and further relief as to equity may appertain and as may be deemed by this honorable court fit and proper.

THE NEW RIVER COMPANY,
By ROBERT H. GROSS, *President.*
WHITE OAK FUEL COMPANY,
By ROBERT H. GROSS, *President.*
STUART COLLIERY COMPANY,
By ROBERT H. GROSS, *President.*
DUNNLOOP COAL & COKE COMPANY,
By ROBERT H. GROSS, *President.*
BECKLEY COAL & COKE COMPANY,
By ROBERT H. GROSS, *President.*
MABSCOTT COAL & COKE COMPANY,
By ROBERT H. GROSS, *President.*
CRANBERRY FUEL COMPANY,
By ROBERT H. GROSS, *President.*

[Jurat showing the foregoing was duly sworn to by Robt. H. Gross. Omitted in printing.]

32 *Appendix A to amended bill.*

United States Railroad Administration.

Director General of Railroads.

CHESAPEAKE & OHIO RAILROAD.

Circular CS–31 (Revised).

RICHMOND, VA., *Jan. 6, 1920.*

To all coal operators:

The following rules are promulgated to govern uniformly the rating of coal mines (other than anthracite) and car distribution to such mines. They will supersede the rules contained in car service section Circular CS–31, issued at Richmond, Va., October 4, 1918, and are effective beginning January 10, 1920:

Rules for rating for car distribution purposes coal mines (other than anthracite) loading coal at mine tipples.

The following rules shall govern the rating of coal mines (other than anthracite) as the basis for the distribution of empty cars to such mines during periods of car shortage:

(a) The daily capacity of each mine (other than mines covered by paragraphs b and c) shall be determined by taking the total coal

tonnage shipped by the mine during the preceding month, dividing it by the number of hours worked in producing it (see paragraph e) and multiplying the quotient by the number of hours in the recog-
33 nized work day (not more than ten hours) of the individual mine. The result shall be termed the "daily rating" of such mine, and shall be the basis on which cars shall be distributed to it during periods of car shortage.

(b) The daily capacity of a mine which is served jointly by or for two or more carriers (steam, electric or water) shall be determined by taking the total tonnage shipped by the mine via all such carriers during the preceding month, dividing it by the number of hours worked in producing it (see paragraph e) and multiplying the quotient by the number of hours in the recognized work day (not more than ten hours) of the individual mine. The result shall be termed the "gross daily rating" of such mine, and shall be the basis on which cars shall be distributed to it during periods of car shortage; provided, that if track or other limiting conditions further restrict its ability to ship via the Chesapeake & Ohio Railroad, such conditions shall be the limiting factor for the Chesapeake & Ohio Railroad's daily rating of such mine.

(c) The daily capacity of a mine delivering part of its output to a coking plant, to locomotives at the tipple or to local trade shall be determined by taking the total coal tonnage shipped in railroad cars during the preceding month, dividing it by the number of hours worked (see paragraph e) and multiplying the quotient by the number of hours in the recognized work day (not more than ten hours) of the individual mine. The result shall be termed the "daily rating" of such mine and shall be the basis on which cars shall be distributed to it during periods of car shortage.

(d) When the fires are withdrawn from part (or all) of the ovens at an operation coking part of its output, for the purpose of shipping coal production formerly used in charging ovens, the daily rating of the mines shall be increased to include the average tonnage per day so diverted in the previous month, until the beginning of the next rating period, at which time the daily rating of the mine shall be determined in accordance with paragraph a or c, due allowance being made for such average tonnage so diverted in computing
34 the new daily rating. A corresponding decrease of the mine's rating will be made when the ovens are again placed in blast.

When a mine that has been coking its entire output desires to ship coal and the fires are withdrawn from part (or all) of its ovens, it shall be given a daily rating for coal shipments corresponding to the average tonnage of coal formerly coked until the beginning of the next rating period, at which time the daily rating of the mines shall be determined in accordance with paragraph a or c.

(e) In determining the number of hours worked in each day at a mine, time will be counted from the established time for beginning work (or the actual time if earlier or later than the established time)

on the tipple until the dumping of coal finally ceases for the day, making deductions for the noon intermission when it is taken, and for the time lost by reason of being blocked with loads, waiting for additional empty cars, or other railroad disability; provided, that if a greater number of hours is worked in the mine than on the tipple, the mine hours must be reported also, and the number of hours worked in the mine must then be used as the number of hours worked in producing the coal. (See paragraphs a, b, and c.) Time may be deducted for railroad disability only when such railroad disability actually reduces the quantity of coal dumped that day. Time may be deducted when tipple is used for dumping coal into locomotives only when the tipple can not be simultaneously operated for loading cars.

(f) Daily ratings determined in accordance herewith will be revised monthly and made effective on the 10th of the month following the month's performance on which the rating is determined.

(g) If a mine be idle for a period of one full calendar month or more, the last rating determined will be the rating when work is resumed, provided the mine conditions be substantially the same as when the mine closed.

(h) Rating for development purposes based on current performance will be assigned to a new operation in previously undeveloped coal. A new mine will be furnished with a supply of cars
35 sufficient to enable it to work freely in the course of development for a period not exceeding 6 months after shipments are begun; provided, that if theretofore its ability to load 150 tons per shift (not, however, to exceed 2 shifts per day) is established, it shall then be rated. A new operation of any other character shall be entitled to a development rating for a period of one month after shipments are begun.

(i) Each mine shall report on a prescribed form to the chairman car allotment commission, Huntington, W. Va., promptly at the close of each day:

1. The number of hours in the recognized workday;
2. The established time for beginning the day's work;
3. The actual time work was begun this day on tipple;
4. If the noon hour intermission is taken, how long;
5. Time lost during the day account:
   Waiting for railroad cars or other railroad disability, ------ hours;
   Strikes or mine labor shortage, ------ hours;
   Mine disability, ------ hours;
   No market, ------ hours;
   All other causes, ------ hours;
6. Time work on tipple ceased for day;
7. Number of hours worked to-day on the tipple, ------, and in the mine, ------ (see paragraph e);
8. Number of net tons of coal loaded for shipment via Chesapeake & Ohio Railroad;

9. Total number of net tons of coal produced and shipped via each other outlet;

10. Number coal loaders working to-day in mine.

Joint mines shall furnish this daily report to each carrier serving them.

If after notice from the railroad an operator persistently fails to furnish this daily report, he will be penalized by curtailment of his car supply to the amount of 25 per cent of distribution for one week.

(j) At the close of each month the mine manager or superintendent in charge of actual operation shall report under oath on a
36 prescribed form to the chairman car allotment commission, Huntington, W. Va., having jurisdiction, separately for each mine for each month, as follows:

1. Number of hours in the recognized workday;

2. Total number of net tons of coal produced;

3. Total number of net tons of coal shipped via the Chesapeake & Ohio Railroad;

4. Total number of net tons of coal shipped via each other outlet;

5. Total number of hours worked during the month (see paragraph e);

6. Average number of coal loaders working daily in mine during month;

7. Total time lost during month account:

Waiting for railroad cars or other railroad disability, ------ hours;
Strikes or mine labor shortage, ------ hours;
Mine disability, ------ hours;
No market, ------ hours;
All other causes, ------ hours.
Total, all mine causes, ------ hours.

This report must be forwarded not later than the 3rd of the month following that for which the statement is furnished; provided, that where the location of the mine makes it inconvenient to furnish a report under oath by that date, a report not under oath may be forwarded, and the sworn report forwarded not later than one week after. Joint mines shall furnish this monthly report to each carrier serving them.

(k) If an operator declines or persistently fails to make reports or to make accurate reports to the carrier as required herein, it will be assumed that the mine worked full hours in producing and loading into railroad cars the tonnage shipped and the daily rating will be computed accordingly.

(l) A statement showing the mine ratings which will govern the car distribution for the succeeding month will be furnished as
37 soon as such ratings are ascertained to such coal mines on this railroad as make application for the same. Such statement will show the mine rating of each mine and the total mine ratings of each coal loading district and the aggregate ratings for all mines

and all districts on this railroad, and the percentage of each such figure to the total.

Rules governing the distribution of cars to coal mine tipples (other than anthracite).

Whenever the available car supply in any region (or district) is such that all orders for cars can be filled, cars shall be placed at each mine in accordance with its daily order, except that whenever a mine holds unbilled coal loads, it shall be entitled only to empty cars equal in number to the difference between the rating last established for the mine and the number of unbilled coal loads so held. Whenever the available car supply is such that all orders for cars cannot be filled, each mine shall be given its pro rata share of cars in accordance with the following rules:

1. The daily rating, or the daily order for cars if less than the rating, shall be the basis for car distribution.

2. Grouping of mines, or pooling of cars as between mines, will not be permitted.

3. On application of mine operators and in the discretion of the railroad, cars may be placed on such days only and at such mines only as may elect to work, and overs and shortages in car supply resulting from this distribution shall be adjusted on succeeding days.

4. Each mine operator shall report to the local car distributor at 4 p. m. daily:

(a) Number of unconsigned loads on hand at 7 a. m.

(b) Number of empty and partly loaded cars on hand at 7 a. m.

(c) Additional number of empty cars received during the day.

(d) Aggregate number of empty cars received during the day.

38 (e) Number of cars loaded during the day.

(f) Number of empty cars standing over at close of day.

(g) Number of empty cars standing over at close of day which were received prior to 7 a. m., ------cars; and prior to 10 a. m. ------ cars.

(h) Number of partly loaded cars under tipple at close of day.

(i) Number of unconsigned loads on hand at close of day.

(j) Additional number of empty cars required for loading following day.

Copies of orders for cars for a mine that is joint with any other carrier (steam, electric, or water) shall be filed with a designated representative of each such carrier. Such combinations must not exceed the gross daily rating of the mine.

5. The recognized standard car for coal car distribution is 50 tons. Others are compared thereto by tenths of a car; i. e., 80,000 pounds capacity equals eight-tenths (.8) of a car; 140,000 pounds capacity one and four-tenths (1.4) cars, etc., and cars must be charged and car distribution records maintained accordingly.

6. (a) All cars placed at a mine during each period of 24 hours ending at 10 o'clock a. m. (or when Sundays or holidays intervene,

the longer period ending at 10 o'clock a. m. of the day immediately succeeding the Sunday or holiday) shall be charged against the mine on the day when such period ends; provided, that if the cars placed at 7 o'clock a. m. (not including partly loaded cars) do not equal or exceed in number 25 per cent of the daily rating (or order if less than the rating) then no cars will be charged against the mine that day except such as are loaded on that day.

(b) Cars placed between 10 o'clock a. m. and the time the mine ceases work for the day, if loaded or partly loaded on the day placed, will be charged against the mine on that day.

39 (c) All cars of other than railroad ownership commonly called "private cars") placed for owners' loading will be considered as ordered.

7. The pro rata share of cars to which each mine is entitled, except as provided in rule 9, shall be based on its rating (or order when less than its rating). When a mine has empty or partly loaded cars which were placed prior to 7 a. m., or unconsigned loads standing over at the close of the day's business, such cars shall be charged against it each day thereafter while they are detained, except as otherwise provided in rule 6.

If on any day a mine be furnished with cars totaling less than 100 per cent of its rating (or order if less than its rating) and for any cause whatever other than railroad responsibility fails to load the entire number, the mine shall be considered as having been furnished 100 per cent of its requirements, and its order shall be arbitrarily reduced to the number of cars furnished.

8. Private cars and such cars as are assigned to mines by the car service section, United States Railroad Administration, will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.

9. If the number of assigned cars placed at a mine during any period, as provided in rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply pro rated to the other mines, based on a revised percentage by reason of such elimination.

10. If the number of assigned cars placed at a mine during any period, as provided in rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share.

11. If a mine receives more or less cars than it is entitled to during any period, as provided in rule 6 (and after eliminating assigned cars as provided in rule 9), it will be charged with a surplus or credited with a shortage accordingly, and the discrepancy adjusted as promptly as practicable.

40 12. A statement showing car distribution for the preceding month will be furnished as soon as such distribution is ascertained, to such coal mines on this railroad as make application

for the same. Such statement will show the car distribution of each mine, the total car distribution of each coal loading district, the aggregate distribution for all mines and all districts on this railroad, and the percentage of each such figure to the total.

13. Such additional information as may be necessary will be asked for from time to time.

W. L. Booth,
Superintendent Transportation.

41 *Appendix B to amended bill.*

Interstate Commerce Commission.

No. 12081.*

Fairmont & Cleveland Coal Company vs. Baltimore & Ohio Railroad Company.

Submitted May 24, 1921. Decided June 21, 1921.

Defendants' practices in distributing cars to mines of complainants for coal loading found to be unreasonable and unduly prejudicial. Reasonable and nonprejudicial rules prescribed for the future.

James W. Carmalt for complainants and interveners supporting complaints.

Francis R. Cross for Baltimore & Ohio Railroad Company; James Stillwell for Monongahela Railway Company; W. H. T. Loyall for Virginian Railway Company, and W. S. Bronson for Chesapeake & Ohio Railway Company.

P. H. Greenlaw and Thomas L. Phillips for Fifth and Ninth Districts Coal Bureau; George T. Bell, George S. Brackett, and G. H. Caperton for Northern West Virginia Coal Operators' Association and local mine operators in the New River district, and F. H. Harwood for Illinois Coal Traffic Bureau, interveners.

Report of the Commission.

Division 5, Commissioners Clark, Aitchison, and Potter.

By Division 5:

These cases involve the same issue, were heard together, and will be disposed of in one report.

42 Complainants are corporations in West Virginia engaged in the operation of bituminous coal mines. The mine of complainant in Nos. 12081 and 12082, known as the Parker Run mine,

* This report also embraces No. 12082, Same vs. Monongahela Railway Company; No. 12083, New River Company et al. vs. Virginian Railway Company; and No. 12084, Same vs. Chesapeake & Ohio Railway Company.

is located at Fairmont, W. Va. Complainant owns and maintains about 1.5 miles of siding on its mining property, connected at the west end with the Baltimore & Ohio Railroad and at the east end with the Monongahela Railway. The complainants in Nos. 12083 and 12084 operate 11 mines in the New River district, W. Va., which are served by the Chesapeake & Ohio and Virginian Railways, as will hereinafter be more fully explained. The New River Company controls by stock ownership the other complainant corporations in the New River district.

It is alleged in substance that the rules, regulations, and practices governing the distribution of cars for the transportation of coal from the mines of complainants to interstate destinations have been since October, 1918, and still are, unjust, unreasonable, and unduly prejudicial, in violation of section 1 and 3 of the interstate commerce act. We are asked to prescribe for the future just and reasonable rules, regulations, and practices with respect to the distribution of coal cars at mines served by two or more carriers, hereinafter termed joint mines.

An intervening petition in support of complainants' contentions was filed at the hearing in Nos. 12083 and 12084 by 14 coal companies operating 23 joint mines in the New River district. These interveners will hereinafter be treated as complainants. Intervening petitions in opposition to complainants' contentions were filed on behalf of the Northern West Virginia Coal Operators' Association in Nos. 12081 and 12082 and on behalf of 14 operators of local mines in the New River district in Nos. 12083 and 12084. The Fifth and Ninth Districts Coal Bureau and the Illinois Coal Traffic Bureau intervened in all four cases, but the latter took a neutral position No evidence was offered by these interveners except the Northern West Virginia Coal Operators' Association, although the Fifth and Ninth Districts Coal Bureau filed a brief.

43 In In re Irregularities in Mine Ratings (25 I. C. C. 286), hereinafter referred to as the Illinois case, we laid down the following rule to govern distribution, during the periods of car shortage, of coal cars to joint mines served by the Illinois Central and other carriers:

We think that on days for which it orders no cars from any other carrier, the junction-point mine should be given its pro rata of cars by the Illinois Central on the basis of its full rating; that on a day for which it orders cars from one other road, its rating on the Illinois Central for that day should be 75 per cent of its full rating, and that on a day for which it orders cars from two other roads, its rating on the Illinois Central for that day should be 50 per cent of its full rating.

This rule, however, was not followed by the defendants herein. The Baltimore & Ohio, Chesapeake & Ohio, and Monongahela treated the joint mines the same as local mines in the distribution of cars. They had no information of the number of cars ordered from the

other carrier. So far as they were concerned the joint-mine operator could order and secure 100 per cent car supply from each road. The practice of the Virginian was unique. Its car supply practically met the demands of the shippers along its line. It therefore set aside a certain number of cars to take care of its fuel needs and of mines under development and pro rated the remainder of its equipment in proportion to the shipments via the Virginian for the preceding 12 months. If one shipper, for example, were issued 480 cars in the pool, it was embargoed, after its loading exceeded the number of cars set aside for the mine or mines until the cars were made empty, and was penalized four days to permit the empties to return from the destination to the mines. This practice was followed at both local and joint mines.

Effective October 10, 1918, car service Circular CS–31 became effective, and under rule 2 prescribed the following method for ordering cars for joint mines:

Copies of orders for cars from a mine that is joint with any other carriers (steam, electric or water) shall be filed with the desig-
44 nated representative of each such carrier. Such combined requests must not exceed the gross daily rating of the mine.

After the signing of the armistice, and until the summer of 1919, there was a lessened demand for coal, and the resultant surplus of coal cars enabled carriers generally to accord all mines a full car supply. The limitations of the rule were not therefore felt until a car shortage developed in the summer of 1919. From that time until approximately December, 1920, the available supply of cars for coal loading throughout the country was insufficient to meet the demands.

At the time Circular CS–31 became effective the Chesapeake & Ohio and Virginian joint mines were zoned, and the car service rules affecting joint mines were not in force. Because of that fact mines zoned to the Virginian had to depend upon the Virginian and mines zoned to the Chesapeake & Ohio had to depend upon the Chesapeake & Ohio, exclusively, for cars.

On March 2, 1920, we issued a notice to carriers and shippers in which we recommended that until experience and careful study demonstrated that other rules would be more effective and beneficial especially during the remainder of the early spring, the uniform rules as contained in the Railroad Administration's car service Circular CS–31, revised, be continued in effect. By further notice to carriers and shippers dated April 15, 1920, our notice of March 2 and our recommendation therein was modified as to rule 8 of the circular. Rule 2 of car service Circular 31 became rule 4 in the revised circular, but contained no change. The complaints are directed against the last sentence of rule 4.

On July 8, 1920, the Chesapeake & Ohio and Virginian, on request of complainants, filed with us a petition asking that they be permitted to follow the rule laid down in the Illinois case. We declined informally to take that action. These complaints followed.

There are two joint mines on the White Oak branch of the Chesapeake & Ohio extending from Glen Jean to Carlisle. This
45 branch was formerly the White Oak Railway. Later the Chesapeake & Ohio granted to the White Oak Railway trackage rights over this branch to enable it to reach these two mines. In the meantime the White Oak Railway had built a new line from Carlisle to Lochgelly and from Duncan's Crossing, a point intermediate to Lochgelly, to Bishop, where it connected with the Virginian Railway. There are three mines located on this new line. In 1912 the Chesapeake & Ohio and the Virginian jointly leased the White Oak and the Piney River & Paint Creek Railroad. In 1917 the new line of the White Oak, above referred to, was purchased by the Virginian, and it is now known as its Wolf Creek branch. In the same year the Chesapeake & Ohio purchased the Piney River & Paint Creek, now known as the Piney River & Paint Creek branch, which connected with the Piney Creek branch of the Chesapeake & Ohio at Beckley Junction. Three and two mines are located on these branches, respectively. The Chesapeake & Ohio also purchased the Price Hill division of the White Oak Railway extending from Price Hill Junction to Price Hill, a distance of about 2.5 miles. This division had no connection with the Wolf Creek branch of the Virginian. Under the terms of a trackage agreement dated November 1, 1917, the Chesapeake & Ohio granted certain trackage rights to the Virginian and the Virginian granted certain trackage rights to the Chesapeake & Ohio over the newly acquired lines, as well as over their own lines, to make the necessary connection with their own operation. This trackage agreement is substantially the same as the trackage agreement in effect between the Chesapeake & Ohio and the Virginian from 1912 to 1917, under which the White Oak and the Piney River & Paint Creek were operated under lease jointly by the Chesapeake & Ohio and the Virginian.

The agreement of sale, and trackage agreement, provided that each carrier should have equal access to and from all mine operations then or thereafter located on the tracks mentioned. For pur-
poses of economy the Chesapeake & Ohio arranged to serve cer-
46 tain of the mines located on its rails as agent for the Virginian, and the Virginian in turn agreed to place Chesapeake & Ohio cars at mines located on its rails. Each road retained the right to perform the service for itself in case complaint was made of the service performed by the order. Each of the mines is shown as being located on each of these roads and the rates are published as applicable by each. The White Oak and Piney River & Paint Creek railways were constructed and owned by the New River Company. One additional mine covered by the complaint is served jointly by the Chesapeake & Ohio and the Kanawha, Glen Jean & Eastern. This latter line is not a defendant and no further consideration will be given to that mine.

The complainants contend that they have the right to order 100 per cent of their gross daily ratings from each of their connections in

times of car shortage and that each road is obligated to serve each of the mines tributary to its rails without discrimination.

It is testified that in acquiring their properties the operators considered it to be essential to successful operation that they have connections with two trunk lines. With this object in view the New River Company built the railways mentioned. The operators of the Parker Run mine commenced operations with the assurance of a car supply from each railroad, one of which was then in contemplation. It is testified that the transportation facilities were a prime reason for the organization of the company. One of the complainants had the option of putting in a drift operation local to the Virginian or a shaft operation entailing a three-mile extension from the Virginian which would permit of a connection with the Chesapeake & Ohio. It elected to pursue the latter course, and built at its own expense one half of the extension and the Virginian built the other half in order that service might be obtained from both roads.

The efforts of the local-mine operators were directed mainly to showing that a greater percentage of cars were left over at joint mines than at local mines; that the capacity of the present
47 sidetracks at joint mines would be insufficient to take care of the equipment if they were permitted to order their gross rating from each carrier; and the alleged advantage which the joint mine has by reason of being able to ship over the road having the greater car supply.

The Baltimore & Ohio contends that the rule in issue is fair and does not operate to the disadvantage of the joint mine, which has the advantage of being able to order cars from the line having the greater car supply. It is interested only to the extent of having rules which will operate equitably as between all shippers of coal situated on its rails, and which will assure the most expeditious handling of equipment.

The interveners operating local mines in the Fairmont and New River districts proceed on the theory that what complainants desire is to order cars on basis of 200 per cent of their maximum capacity to produce. This, however, is not the fact. Complainants' request, while theoretically based on the right to order 100 per cent from each carrier, is subject to restriction to its total mine rating.

The complainants further contend that the operation of the rule referred to amounts to a denial of car service to the complainants, and that the rule was issued solely as a war measure. This contention is not supported by the record. On the contrary, it appears that at the time of the adoption of Circular CS–31 no consideration was given to the length of time the rules were to be made operative, although the fact that the roads were being operated as a unit under Federal control was a prime reason for the adoption.

The practical operation of the rule complained of is as follows: Mine A is a joint mine served by the Chesapeake & Ohio and Virginian; mine B is local to the Chesapeake & Ohio, while mine C is local to the Virginian. Each has a daily rating of 20 cars. On a cer-

tain day the Virginian has a 70 per cent car supply, and the Chesapeake & Ohio a 50 per cent car supply. Mine A divides its order between the Chesapeake & Ohio and the Virginian; that is, it orders 10 cars from each carrier. Local mines B and C each orders 20 cars. As the car supply of the Chesapeake & Ohio is 50 per cent it would furnish mine A with 5 cars while the Virginian, with a 70 per cent car supply, would furnish 7 cars, or a total of 12 cars from both roads. Mine B would receive 10 cars from the Chesapeake & Ohio, and mine C 14 cars from the Virginian.

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The joint mines in the New River district, during the month of August, 1920, under the operation of the rule here complained of, received 1,392.6 cars from the Chesapeake & Ohio and 1,881.8 cars from the Virginian, or 167.3 cars more from the Chesapeake & Ohio and 48.2 cars less from the Virginian than they were entitled to. If they had been accorded a similar car supply as local mines with like ratings located on defendants' lines they would have received 2,104.9 cars from the Chesapeake & Ohio and 3,471.1 cars from the Virginian. These joint mines received 183.6 cars less on the Chesapeake & Ohio and 714.6 cars less on the Virginian than they would have been entitled to during the said month under the rule approved by us in the Illinois case.

During 1920 cars left over at local mines on the Chesapeake & Ohio averaged 8.2 per cent of cars placed, while those left over at joint mines in the New River district averaged 11.4 per cent. The left-overs on the Virginian at joint mines were slightly in excess of the left-overs at local mines, due in part to the physical conditions on what was formerly the White Oak Railway. The Virginian operates over that line only in the daytime, and efforts are made to get sufficient cars to the mines the night preceding for the commencement of operations the following day. If cars are placed too late in the afternoon to be loaded they are reported as being left over. A witness for the Chesapeake & Ohio testified that the question of left-over cars was largely a matter of policing, and that if proper information were given to each railroad regarding the order and supply of cars there would be no occasion for cars being left over at joint mines to a greater extent than at local mines. This witness testified that rule 4 is defective in that it does not require that all lines serving joint mines be supplied with such information as would make over-ordering impracticable, and thus make full utilization of the empty equipment available from day to day.

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The complainants concede that the railroads should exchange such information as will enable them to police left-over cars, and that very few joint mines have trackage facilities greater than their capacity to ship. No difference appears in the record in the latter respect between joint and local mines.

The interveners have filed in evidence a statement of competitive car supply on basis of equivalent number of full days worked by joint mines as against local mines in the New River district by months, for the period from March 1 to December 31, 1920, both

dates inclusive. This statement shows that the joint mines worked 157.13 days and the local mines 123.78 days. An aggregate rating of the mines by each carrier is shown, together with the total cars supplied by each. The total cars supplied by both roads are divided by the average aggregate rating of both roads, and the result is shown as the equivalent of the number of full days worked. This statement is subject to the criticism that it takes the aggregate mine ratings rather than the number of cars ordered.

While it is true that the joint mine has an advantage by reason of its location on two railroads because of the additional markets which it can reach, it is likewise true that the joint mine is not always in a position to avail itself of its alleged advantage because of the practice in the coal business to make contracts for yearly periods beginning with April 1. Neither is it possible at all times for the joint mines to order all their cars from the carrier having the greater car supply, as its contracts may also require shipments to be made by the line having the lesser car supply in order to meet its current obligations. It frequently happens that the joint mine receives a less car supply than the local mine situated on the road having the greater car supply

In the Illinois case we said:

50 "Owners of junction-point mines have expended large sums in order to secure connections with more than one road. The junction-point mine has available a more extensive and more varied market for its coal. It may at times be able to dispose of its products upon the second line of railroad, while the mine local to the first road is unable to market its output. In case of car shortage the junction-point mine is able to select the outlet which affords the best and most liberal means of transportation. These are important advantages to which the junction-point mine is entitled and in the reasonable enjoyment of which it should be protected.

"* * * It would be unjustly discrimnatory against the junction-point mine not to give reasonable recognition to its natural advantages of location."

We also stated that it was necessary, in order to avoid unjust discrimination in favor of the joint mine as compared with the local mine, to somewhat limit its power to assert its capacity against two or more carriers at the same time.

Following the views expressed in that case, and upon this record, we find that rule 4 of Circular CS–31, revised, is unreasonable and unduly prejudicial to joint mines and unduly preferential of local mines, to the extent that it limits the aggregate orders of the joint mine to 100 per cent of its rating from both roads; and that for the future during periods of car shortage defendants should distribute cars to the joint mines on their lines here considered on the basis outlined in the Illinois case, namely, on days when the joint mine orders cars from only one carrier it shall have cars based upon its full rat-

ing from that carrier, and on days on which it orders cars from both carriers its rating on each of such carriers shall be 75 per cent of its full rating, subject to the limitation that it shall on no day be supplied with cars in excess of its maximum rating. Information should be exchanged between carriers showing the left-over cars in order to prevent some of the abuses which have heretofore been pointed out.

Under paragraph 13 of section 1 of the interstate commerce act we are authorized by general special orders to require all the car-
51 riers by railroad subject to the act to file with us from time to time their rules and regulations with respect to car service, and we may, in our discretion, direct that such rules and regulations be incorporated in the schedules showing rates, fares, and charges for transportation and be subject to any or all of the provisions of the act relating thereto.

We have not required that car service rules be filed as tariff schedules. We will not in this proceeding direct that the rules which we herein find to be reasonable be so filed. We shall expect, however, that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us.

By the commission, division 5.

(SEAL.) GEORGE B. MCGINTY, *Secretary.*

62 I. C. C.

(Washington: Government Printing Office: 1921.)

A true copy.

GEORGE B. MCGINTY, *Secy.*

52 *Appendix C to amended bill.*

Interstate Commerce Commission.

No. 12362.*

BELL & ZOLLER COAL COMPANY ET AL. VS. BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY ET AL.

Submitted March 16, 1922. Decided December 11, 1922.

Defendants' rules governing the distribution of cars to mines of complainants for coal loading found not unreasonable or unduly prejudicial. Decision in In re Irregularities in Mine Ratings (25 I. C. C., 286) distinguished and limited. Fairmont & Cleveland Coal Co. vs. B. & O. R. R. Co. (62 I. C. C., 269) reversed. Complaints dismissed.

Clarence B. Cardy, Cooper, Royse, Bogart & Gambill, Paul N. Bogart, and Samuel D. Royse for complainants in Nos. 12362 and 12399.

* This report also embraces No. 12399, Vigo Mining Company et al. vs. Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company et al.; No. 12081, Fairmont & Cleveland Coal Company vs. Baltimore & Ohio Railroad Company; No. 12082, Fairmont & Cleveland Coal Company vs. Monongahela Railway Company; No. 12083, New River Company et al. vs. Virginian Railway Company; and No. 12084, New River Company et al. vs. Chesapeake & Ohio Railway Company upon reargument.

James W. Carmalt for complainants in Nos. 12081, 12082, 12083, and 12084.

O. W. Dynes for Chicago, Milwaukee & St. Paul Railway
53 Company; A. P. Humburg for Illinois Central Railroad Company; Robert H. Widdicombe for Chicago & North Western Railway Company; Kenneth F. Burgess for Chicago, Burlington & Quincy Railroad Company; L. P. Day for Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; and W. S. Bronson for Chesapeake & Ohio Railroad Company.

P. H. Greenlaw for Fifth and Ninth Districts Coal Bureau.

Eugene McAuliffe for Union Colliery Company; John M. Sternhagen for Clinton Coal Company, W. S. Bogle Company, and S. B. Mines Company.

Eugene McAuliffe, F. X. Sextro, James Forrester, and George V. Penwell for committee of local mine operators of Illinois; George S. Brackett for Northern West Virginia Coal Operators' Association; G. H. Caperton for committee of local mine operators in New River district of West Virginia; and George T. Bell for interveners.

Report of the Commission.

By the Commission:

These cases involve similar issues and will be disposed of in one report.

In Fairmont & Cleveland Coal Co. vs. B. & O. R. R. Co. (62 I. C. C., 269), hereinafter termed the Fairmont cases, we had before us rule 4 of car service Circular CS-31, revised We found that rule to be unreasonable and unduly prejudicial to joint mines and unduly preferential of local mines, to the extent that it limited the aggregate orders for cars of the joint mine to 100 per cent of its gross daily rating. We also found that for the future, during periods of car shortage, defendants should distribute cars to the joint mines on their lines on the basis outlined in In re Irregularities in Mine Ratings, (25 I. C. C., 286), hereinafter called the Illinois case. In effect, that rule provided that on days when the joint mine orders cars from only one carrier it shall be furnished cars based on its full rating from that carrier, and on days on which it orders cars from both carriers its rating on each of such carriers for the purpose of ordering cars
54 should be 75 per cent of its full rating, subject to the limitation that on no day shall it be furnished with cars in excess of its maximum rating. No order was entered. Upon petition of intervening local mine operators, we reopened those cases for further argument, and consolidated them with Nos. 12362 and 12399. These cases were submitted together.

The complainants in the Fairmont cases operate joint mines in West Virginia, one of which, located in the Fairmont district, is served jointly by the Baltimore & Ohio and the Monongahela, and the others, located in the New River district, are served jointly by the Chesapeake & Ohio and the Virginian. Complainants in No. 12362

operate 61 joint and 18 local mines in Illinois, while complainants in No. 12399 operate 6 joint mines in Indiana. Some of the mines in the latter two cases are served by more than two carriers.

All tne complaints substantially allege that defendants' rules, regulations, and practices governing the distribution of coal cars to complainants' mines served jointly by two or more railroads have resulted in the distribution during car-shortage periods since October, 1918, of a smaller share of empty coal cars to complainants' mines than is distributed to and received by mines in the same territory which are served by one defendant carrier only; and have been and are unreasonable, unduly preferential of complainants' competitors, and unduly prejudicial to complainants, in violation of sections 1 and 3 of the interstate commerce act. We are asked to prescribe just, reasonable, and nondiscriminatory rules, regulations, and practices to govern the distribution of coal cars to mines served by more than one carrier.

Various operators and committees have intervened in opposition to the complaints in Nos. 12362 and 12399. The Union Colliery Company was the only intervener in whose behalf evidence was offered. Various intervening petitions were filed in Nos. 12081, 12082, 12083, and 12084, as appears in our report in the Fairmont cases, at page 270.

The defendants assume a neutral position and are merely
55 concerned with the establishment of a rule that will be fair and reasonable to all parties concerned, and which will be workable.

Throughout this report the term "local mine" will be used to designate a mine situated on and served by only one railroad. The term "joint mine" will denote a mine served by 2 or more railroads with their own rails or a mine situated on 1 railroad, but actually served by 1 or more additional carriers under trackage agreements of switch-absorption arrangements. Complainants' mines which are described of record, are embraced within the term "joint mine."

For some years prior to 1912 there was constant controversy between the Illinois Central Railroad and the operators of coal mines located upon its rails relative to the mine ratings, which form the basis of car distribution in times of car shortage, and the rules governing such distribution of cars. The matter was finally submitted to us for determination, upon the record in a proceeding in which no other carrier was a party. In the Illinois case, decided December 3, 1912, we alluded to the rules of the different carriers, discussed the contentions of the conflicting interests, and laid down certain rules to be observed in the rating of mines under the circumstances of that case, and the following rule to govern the distribution of coal cars by the Illinois Central, during periods of car shortage, to mines served jointly by it and other carriers:

"We think that on days for which it orders no cars from any other carrier, the junction-point mine (joint mine) should be given its pro rata of cars by the Illinois Central on the basis of its full rating; that on a day for which it orders cars from one other road, its rat-

ing on the Illinois Central for that day should be 75 per cent of its full rating; and that on a day for which it orders cars from two other roads, its rating on the Illinois Central for that day should be 50 per cent of its full rating."

These rules were thereafter followed by the Illinois Central.
56 Certain other carriers in that territory, including the Chicago & Eastern Illinois, hereinafter called the Eastern Illinois, Missouri Pacific, Chicago, Indianapolis & Louisville, and the Chicago, Terre Haute & Southeastern, voluntarily applied the same rule. The method of rating the mines on the Missouri Pacific was somewhat different. The Chicago, Burlington & Quincy hereinafter referred to as the Burlington, treated all mines on its line on an equality so far as distribution was concerned. Its rules provided for rating the mines on the basis of the tonnage shipped over its road for 10 consecutive days when the mine operated full time and there was a full car supply, plus 20 per cent for development and increase. Every mine, whether local or joint, was entitled to order cars from it based on 100 per cent of its rating as thus determined. The witness produced by this carrier was unable to state in what manner cars were distributed by other carriers to mines served jointly by the Burlington and such other carriers. The methods of car distribution of the other carriers against which the complaints in Nos. 12362 and 12399 are directed are not shown of record, but apparently they were not uniform. Those adopted by the defendants in the Fairmont cases are set forth in our report in those cases.

During the World War agencies were created by the Government to deal with problems of fuel supply. In December, 1917, the principal railroads were taken under Federal control, and thereafter, until March 1, 1920, were operated as a unified and coordinated national system. In April, 1918, the United States Fuel Administration adopted a zoning system, the purpose of which was to minimize haulage, prevent cross hauls, control the distribution of coal to consuming territory, and to increase the supply of cars for coal loading. This system naturally affected and materially changed the distribution of coal so far as markets were concerned. The price of coal was fixed by the fuel administrator.

On October 10, 1918, in Circular CS–31, the United States Railroad Administration promulgated a uniform code of rules governing the rating of coal mines (other than anthracite), loading coal at mine tipples and the distribution of cars to such mines, to
57 supersede all then existing rules, which were far from uniform. Rule 2 of this circular provided that:

"Copies of orders for cars from a mine that is joint with any other carrier (steam, electric or water) shall be filed with the designated representative of each such carrier. Such combined requisitions must not exceed the gross rating of the mine."

This circular was reissued as Circular CS–31, revised, effective January 10, 1920. Rule 2 became rule 4 of the revised circular, but contained no change. This rule, which prohibits the operator from

ordering cars in excess of the gross daily rating of the mines, was a radical departure from the rule prescribed for the Illinois Central in the Illinois case. It was apparently accepted by the operators as a war measure, and because the roads were being operated as a unit under Federal control. Until September, 1919, when a car shortage developed, the mines had all the cars and business that they could take care of, and the effects of rule 2, later rule 4, were not fully apparent until that time. From January to November, 1920, the carriers were unable to meet the demand made upon them for empty coal cars.

Federal control of the railroads terminated March 1, 1920. The transportation act, 1920, approved February 28, 1920, brought paragraph (12) into section 1 of the interstate commerce act, in part as follows:

"It shall be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine."

58 On March 2, 1920, in a notice to carriers and shippers we recommended that until experience and further study demonstrated that other rules would be more effective and beneficial, the uniform rules prescribed in car service Circular CS–31, revised, be continued in effect. This notice was supplemented by a further notice to carriers and shippers dated April 15, 1920, modifying the previous recommendation in certain respects not here material.

In June, 1920, owing to the peculiar conditions existing in Indiana, the carriers in that State began to distribute cars under what is known as the "round robin rule." This contemplated the running of certain mines full time on days when there was a car supply sufficient to give but a part of the mines full running time, and shutting down others, equalizing the time between all the various mines in the current or succeeding months. This practice was agreed to by the operators.

The complainants herein are directed against the last sentence of rule 4 of Circular CS–31, revised, which limits the joint-mine orders for cars from all the carriers to the gross daily rating of the mine. The whole subject of the ratings of coal mines, other than anthracite, and the distribution of cars between them in times of short car supply, is pending before us in another proceeding. While there may be local variations in method of application, the general basis of ratings may be stated in substance.

The rating of a local mine is determined by taking the total tonnage shipped by the mine during the preceding month over the carrier serving the mine dividing it by the number of hours worked

in producing it, and multiplying the quotient by the number of hours in the recognized workday (not more than 10 hours) of the individual mine. A rating so determined is called the daily rating, as distinguished from the gross daily rating which applies to a joint mine, and which is determined in a similar manner, but by taking the total tonnage shipped over the lines of all the carriers serving the mine.

Complainants contend that a joint mine is entitled to the same pro rata distribution of cars from each carrier as the local
59 mines on each of the carriers serving it. They claim that each carrier is under a legal obligation to give equal service to all mines located upon its lines. They do not demand the full measure of that which they consider as their due, the legal right to order cars from each carrier based upon the gross daily rating of the mine, but ask that we restore the rule prescribed for the Illinois Central in the Illinois case, with the limitation that in no case should cars be furnished to such joint mine in excess of its gross daily rating.

Certain joint mines in Illinois and Indiana have expended large sums to secure connections with more than one road. This is not true as to all of the joint mines. The evidence seems to establish the fact that it was the desire of the carrier to secure coal traffic particularly in the southern Illinois coal field, which led to arrangements being made by them for ingress to large mines, either by building into such mines or by means of trackage agreements or switching-absorption arrangements. In instances of this kind it not infrequently happens that the joint mine builds and maintains its own switch tracks and maintains its own locomotives to perform the necessary switching service. The location of the joint mines in the New River and Fairmont districts, and the manner in which service is accorded those mines, are fully set forth in our report in the Fairmont cases, and need not be repeated here.

It is admitted by all that the joint mine enjoys advantages not possessed by the local mine, and has the right to so place its orders as to avoid, if it can, embargoes and congestion of traffic on particular roads. It has available a more extensive and more varied market for its coal. It may at times be able to dispose of its product upon the second line of railroad, while the mine local to the first road is unable to market its output. In case of car shortage the joint mine is able to select the outlet which affords the best and most liberal means of transportation. These are important advantages to which the joint mine is entitled and in the reasonable enjoyment of which it should be protected.

Complainants urge that under rule 4, here attacked, the natural advantages of the joint mine are not recognized in the distri-
60 bution of cars. They say that the rule does not give the joint mine any advantages in this respect when, due to the development of its markets and the contracts which it has assumed, it must, of necessity, ship over lines other than the one having the greater

car supply. Under the present rules a joint mine can receive as great a number of cars as the local mine located on the line having the greater car supply by confining its orders exclusively to that line. Complainants contend that rule 4 has had the effect, therefore, of limiting their distribution to markets on one railroad only. With this contention we are unable fully to agree. Whenever the joint mine orders cars from the different carriers serving it, it is doubtless due to other compensating advantages which outweigh those of a temporary greater car supply, and such election is the voluntary choice of the shipper.

The operation of rule 4 is shown by the following example: A joint mine with a gross daily rating of 50 cars located on carriers A and B orders all its cars from carrier A, which has an 80 per cent car supply. The joint mine will receive the same number of cars as a local mine with a daily rating of 50 cars on carrier A. However, if carrier B has a 50 per cent car supply and the joint mine divides its order equally between the two carriers, it will receive 80 per cent of 25 cars, or 20 cars, from carrier A, and 50 per cent of 25 cars, or 12.5 cars, from carrier B, a total of 32.5 cars compared with 40 cars received by the local mine on carrier A. Should the joint mine order more than half its cars from the carrier with the greater car supply this will change the figures somewhat, but in no instance will the joint mine receive as many cars as the local mine served by carrier A if the orders are divided. The complainants concede that the joint mine will, in the aggregate, receive more cars than the local mine located on the carrier with the lesser car supply, and it possibly may receive more cars on the average than the local mines of similar rating on both carriers.

In Ridge Coal Mining Co. vs. M. P. R. R. Co. (62 I. C. C. 259, 262), we said:

"* * * the actual or constructive location of the com-
61 peting mines upon two or more lines of railroad substantially differentiates their situation from that of the complainant's local mine; and that the preference and advantage over the complainant which such competing mines enjoy by reason of service by two or more lines is not undue."

During September, 1919, the daily ratings of joint and local mines on the Illinois Central (St. Louis division) were 1,845 and 801 cars, respectively. On this basis, under Circular CS-31, revised, the joint mines would have been entitled to 69.7 per cent of the 23,042 cars delivered by the Illinois Central to all mines on its St. Louis division during that month, or 16,060 cars, if they had confined all their orders to that railroad. By dividing their orders for cars they received 4,068 cars less than they otherwise would have received. Under the rule of the Illinois case the daily rating of these joint mines on the Illinois Central during the same month would have been 1,106 cars, or 57.9 per cent of the total ratings of all mines, provided the orders for cars were divided among all the carriers serving the joint mines. On this basis the joint mines would have been entitled to 13,341 cars,

or 1,349 cars more than they actually received. During October, 1919, using the same basis, the joint mines would have received 6,532, or 2,742 cars, respectively, less than they actually did receive, while during August, 1920, the deficiencies would have been 6,968, or 4,272 cars, respectively. Joint mines on the Missouri Pacific and Eastern Illinois would likewise have received substantially fewer cars. While the Burlington's car supply during the periods covered by the complaint in No. 12362 was better than that of other roads, complaints for comparative purposes used the Illinois Central figures for the reason that the Burlington did not operate under the rule prescribed in the Illinois case. Complainants in Nos. 12362 and 12399 have submitted no statement as to the relative car supply furnished joint mines and local mines during any period.

Interveners have introduced as exhibits statements which compare the car supply at joint and local mines in southern Illinois
62 during certain months. In September, 1919, the local mines in Franklin, Williamson, Perry, and Gallatin Counties were furnished cars on an average equivalent to 73.3 per cent of their mine ratings, while the joint mines in the same counties during the same month were furnished cars on the average equivalent to 84.6 per cent of their mine ratings. From this interveners argue that since the joint mines already have an advantage, it can not be found that they are prejudiced under the application of rule 4. This conclusion does not follow. The exhibit shows that the Burlington, which during this month had the best car supply, served only 6 of the 30 local mines, but served 23 of the 35 joint mines, and that the joint mines in each case ordered by far the greater portion of their cars from that road. It follows that the joint mines would secure a greater percentage of cars on the average than the local mines, the great majority of which are on the roads with a lesser car supply. If the joint mines had confined their entire order to the road with the best car supply the percentage in favor of the joint mine would have been somewhat increased.

During 1920 cars left over in the New River district at local mines on the Chesapeake & Ohio averaged 8.2 per cent of cars placed, while those left over at joint mines averaged 11.4 per cent of the number placed. On the Virginian the cars left over at joint mines were slightly in excess of those left over at local mines, due in part to the physical and operating conditions on what was formerly the White Oak Railway. A witness for the Chesapeake & Ohio testified that the question of left-over cars was largely a matter of policing, and that if proper information were given to each railroad regarding the order and supply of cars there would be no occasion for cars being left over at joint mines to a greater extent than at local mines. Rule 4, in the opinion of the witness, does not require that all lines serving joint mines be supplied with such information as would make overordering impracticable and thus provide a full utilization of the empty equipment available from day to day.

The evidence indicates that in times of car shortage mine ratings, both local and joint, become inflated an average of 33⅓ per cent.

The mine which has the means of more consistently securing
63 as much as or more than 75 per cent of its daily rating will have more cars left over than another mine which does not possess such means. Therefore to permit of a further inflation of 50 per cent for the purpose of ordering cars would result in a waste of equipment unless some means are devised to prevent overrating of the mines. Witnesses for the joint mines stated that if the carriers would advise the operators each day as to the probable available car supply no more cars would be ordered than could be loaded in one day. Information of this kind should be conveyed to the operators of both joint and local mines.

Interveners contend that unless an order for cars for the transportation of coal be accompanied by a bona fide tender or setting aside of the coal to be transported, it is not a reasonable request for transportation within the meaning of paragraph (4) of section 1 of the interstate commerce act. For example, if the gross daily rating of a mine is 200 tons, interveners contend that it would be unreasonable to say that the mine, for the purpose of ordering cars, should be in a position of tendering 300 tons to the carriers serving it and to secure its pro rata share of cars on that basis.

Interveners further contend that the first sentence of paragraph (12) of section 1 requires every carrier, during periods of car surplus, to make a just and reasonable distribution of cars among the mines served by it or customarily dependent upon it for car supply, and leaves the question of what is a just and reasonable distribution of cars to the discretion of the carrier or to us upon complaint and after full hearing, while the second sentence of paragraph (12) specifies the particular manner in which the cars are to be distributed during periods of car shortage and leaves nothing regarding the distribution either to the discretion of the carrier or to us. This sentence does not use the term "distribution," but interveners argue that to maintain and apply just and reasonable ratings and to count each and every car furnished to or used by any such mine for transportation of coal against the mine is a mandatory rule of law requiring an exact pro rata distribution of cars in accordance with the prescribed ratings, whether the mine be served by one or

more carriers. In view of our conclusions herein, and because
64 the interpretation of paragraph (12) is before us in another proceeding now pending, we will not pass upon that contention here.

Upon the present record and in the light of instant conditions we are not disposed to extend the principle laid down in the Illinois case, which was intended as a limitation upon the practice of the respondent in that proceeding. Ten years have elapsed since our decision in that case, and we now have a considerable experience with the results of the practice inaugurated by the carriers following our determination, as well as a broader record. We have indi-

cated in proceedings of this character that the principle of stare decisis has no application, and that our determinations as to what will for the future be just and reasonable must meet changed conditions and wider knowledge, as developed by the passage of time. (Hillside Coal & Coke Co. vs. P. R. C. Co., 19 I. C. C. 356, 361.) Indeed, in passing upon the mine-rating feature of the Illinois case, we indicated in the report at page 295, that we did so only upon the facts and under the conditions there presented, and that our determination in approving the basis presented was not to be understood as indicating approval of its adoption in places where it would not suitably and properly meet the conditions, or where it would be objectionable to the great majority of those affected thereby. In important particulars the present record presents new aspects to us. There have been important developments in the coal industry, not then in contemplation. The superior advantages of the joint mine over its local competitor, in part flowing from the decision in the Illinois case, have resulted in a proportionately greater development of the industry at points where mines may be served by two or more carriers rather than by but one. A duplication of trackage and of trackage rights has followed in numerous instances. The practice indicated in the Illinois case seems, in certain instances, to result in a waste of car-days which in view of the effects of recent and present car shortages should be avoided. There has been extreme dissatisfaction in the ranks of mine labor, accentuated, in any event, by inequalities in opportunities for working time and wages. The results of such disturbed labor conditions have been harmful to the carriers and to shippers. Whatever tends to
65 inflate the nominal mine ratings beyond the amount which can normally be produced and shipped is distinctly counter to the public interest. We had before us in the Illinois case other objections, not then considered determinative, but which we may fairly consider as still existent.

The present facts considered, we do not conclude upon these records that the rule attacked, rule 4 of Circular CS–31, revised, is in principle unreasonable or unduly prejudicial. Our former conclusions in the Fairmont case, based upon a mistaken adherence to and extension of the decision in the Illinois case, are reversed. The present decision of the course without prejudice to such determination of the questions before us in the general proceeding indicated as involving the mine rating and car-distribution rules as the record may there require. The complaints herein will be dismissed, and we will enter an order to that effect.

Potter, Commissioner, dissenting:

I favor the application of the rule of the Illinois case. To do otherwise is in my judgement to deprive of valuable advantage of location and destroy absolute right under the law. It seems to me the majority report tends to make law rather than apply and enforce it. I think a joint mine has the right to be regarded by each road

as though that road were the only road serving it. It loses no right from one when another reaches it. It should receive pro rated equipment from each road based on the traffic which it tenders to that road in proportion to the traffic tendered by other mines. The volume to be considered as its tender to a particular road is its rated output less the tonnage to be shipped by other lines. The rule of the Illinois case in application recognizes a mine's rights and affords method to work them out with substantial justice in a practical manner. If opportunity to ship over more than one road gives a joint mine an advantage in being able to furnish to labor more nearly continuous employment, that advantage belongs to the mine because of the superior transportation service available to it. We may not restrict the use of transportation facilities in order to equalize mine
66 operation. To do so would be to require discrimination in the use of equipment—not remove it. If a local mine is at a disadvantage it is not because of a transportation problem with which we may deal but because of a labor supply problem which is not for us. It is by no means certain that the application of the rule of the Illinois case affects labor injuriously or tends to disturb the adjustment.

67 *Order.*

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 11th day of December, A. D. 1922.

No. 12362.

Bell & Zoller Coal Company et al. v. The Baltimore & Ohio Southwestern Railroad Company et al.

No. 12399.

Vigo Mining Company et al. v. The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company et al.

No. 12081.

Fairmont & Cleveland Coal Company v. The Baltimore & Ohio Railroad Company.

No. 12082.

Fairmont & Cleveland Coal Company v. The Monongahela Railway Company.

No. 12083.

New River Company et al. v. The Virginian Railway Company.

No. 12084.

New River Company et al. v. The Chesapeake & Ohio Railway Company.

These cases being at issue upon complaints, answers, and intervening petitions on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the complaints in these proceedings be, and they are hereby, dismissed.

By the commission.

[SEAL.] GEORGE B. MCGINTY, *Secretary.*

68 District Court of the United States for the Southern District of West Virginia.

[Title omitted.]

SUPPLEMENTAL BILL OF COMPLAINT.

That the complainants, the New River Company, White Oak Fuel Company, Stuart Colliery Company, Dunnloop Coal and Coke company, Beckley Coal and Coke Company, Mabscott Coal and Coke Company and Cranberry Fuel Company, filed, on or about January 29, 1923, in this honorable court their original bill of complaint against the Chesapeake and Ohio Railway Company, The Virginian Railway Company, the United States of America and the Interstate Commerce Commission, for the purpose of securing an adjudication and decree that a decision, order and ruling of the Interstate Commerce Commission of December 11, 1922, and a certain rule put into effect in accordance therewith, known as rule 4 of Circular CS-31, revised, were without warrant of law and null and void and that the same be set aside and annulled; also praying for a suspensory order,

69 a temporary injunction and a permanent injunction restraining and enjoining the defendants from restricting in accordance with said decision, ruling and order and said rule 4, the transportation service in interstate commerce of the defendant carriers to the complainants, and for other relief, all as set forth in said bill of complaint.

That in Article XVI of said bill your complainants alleged that the Interstate Commerce Commission had failed to take any action on a petition of the complainants filed with the Interstate Commerce Commission to reopen the proceedings in which said decision was rendered and said rule and order issued, and that said decision, ruling and order issued, and that said decision, ruling and order and said rule 4 continued to be in full force and unmodified.

That the complainants hereby further show, by way of supplement:

That on February 5, 1923, since the filing of said original bill, the Interstate Commerce Commission entered an order denying said petition to reopen said proceedings.

THE NEW RIVER COMPANY,
WHITE OAK FUEL COMPANY,
STUART COLLIERY COMPANY,
DUNNLOOP COAL & COKE COMPANY,
BECKLEY COAL & COKE COMPANY,
MABSCOTT COAL & COKE COMPANY,
CANBERRY FUEL COMPANY,
By JAMES W. CARMALT,
AUGUST G. GUTHEIM,
ADDISON C. BURNHAM,
Their Attorneys.

[Title omitted.]

70 In United States District Court.

ORDER AND NOTICE OF HEARING.

Bill of complaint in equity in the above entitled proceedings having this day been presented to this court by the complainants by James W. Carmalt, their attorney in said cause, and application for hearing thereon before three judges as provided in 38 Stat. L. 219, having at the same time been made;

And the said bill of complaint and application for hearing upon those prayers of the bill of complaint, asking for temporary restraining orders and interlocutory injunctions having been duly considered;

It is ordered that said bill of complaint be filed in this court;

It is further ordered that hearing upon said application be set at the court rooms of the United States District Court for the District of Virginia, at Richmond, Virginia, at 10 o'clock a. m., Tuesday, February six, 1923;

It is further ordered that copy of this order together with copy of said bill of complaint be served upon each defendant in said cause;

And it is further ordered that service of this order and of said bill of complaint upon said defendants shall constitute the notice of hearing as in said statute provided.

71 In the District Court of the United States for the Southern District of West Virginia.

MOTION OF UNITED STATES TO DISMISS ORIGINAL BILL.

[Title omitted.]

Comes now the United States of America, one of the defendants in the above entitled cause, by its counsel, and moves the court to

dismiss the bill of complaint herein for want of jurisdiction, at complainants' cost, because:

1. The suit is not a suit against the United States to annul and enjoin an order of the Interstate Commerce Commission, pursuant to the Commerce Court act of June 18, 1910 (ch. 309, 36 Stat. 539) and the urgent deficiencies act of October 22, 1913 (ch. 32, 38 Stat. 219-221), but is obviously a suit against certain common carriers to enjoin them from putting into force and effect a certain rule adopted by the carriers.

2. The order entered December 11, 1922, by the Interstate Commerce Commission, which complainants seek to have annulled, enjoined and declared void, is a negative order.

3. The bill of complaint seeks to invoke the jurisdiction and authority of the court in a controversy between complainants and the defendant carriers which has heretofore been submitted to, heard, and determined by the Interstate Commerce Commission, to the end and in the hope that the court will substitute its juris-
72 diction for that of the commission with respect to a matter committed to the exclusive jurisdiction of the said commission.

4. It appears from the bill of complaint (par. xvi) that the matters complained of and against which relief is sought are now pending before the Interstate Commerce Commission upon the application for rehearing filed by complainants and others.

5. The matters complained of and concerning which relief is sought have been submitted to and adjudicated by the Interstate Commerce Commission, which is charged by law with the determination of such matters. The order made by the said commission was made in the exercise of judgment and discretion in a matter within its sole jurisdiction and hence can not be reviewed or controlled by the courts.

Therefore, defendant prays that its motion be sustained.

ELLIOTT NORTHCOTT,
United States Attorney.
H. L. UNDERWOOD,
Attorney.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

In the District Court of the United States for the Southern District of West Virginia.

MOTION OF UNITED STATES TO DISMISS AMENDED BILL, ETC.

[Title omitted.]

Comes now the United States of America, one of the defendants in the above-entitled cause, by its counsel, and, without waiving its motion heretofore filed to dismiss the bill of complaint for
73 want of jurisdiction, but at all times, now and hereafter, standing and relying thereon, moves the court to dismiss the amended

and supplemental bills of complaint herein for want of equity, and because the said bills do not state facts sufficient to entitle the complainant to the relief sought therein, or to any part thereof, or to any relief in equity.

ELLIOTT NORTHCOTT,
United States Attorney.
H. L. UNDERWOOD,
Attorney.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

In the District Court of the United States for the Southern District of West Virginia.

MOTION OF INTERSTATE COMMERCE COMMISSION TO DISMISS ORIGINAL BILL.

[Title omitted.]

Now comes the Interstate Commerce Commission, one of the defendants in the above-entitled suit, hereinafter called the commission, and moves the court to dismiss, as to it, the bill of complaint in said suit upon the grounds that—

1. The bill of complaint does not contain statements or allegations of fact which entitle the complainants or any of them to the relief or any of the relief prayed for by complainants in and by said bill of complaint.

74 2. The commission's order of December 11, 1922, which is included in Appendix C to the bill of complaint, and wherein and whereby the commission denied the relief asked for by complainants in certain proceedings before the commission, mentioned in the bill of complaint, and dismised their complaints, is a negative order within the meaning of the ruling of the Supreme Court of the United States in Proctor & Gamble Company v. United States (225 U. S. 282), and therefore an order over which this court may not properly exercise jurisdiction.

3. The commission's report, included in said Appendix C, which is referred to in the bill of complaint as the commission's "decision and ruling," does not contain any order or requirement, and therefore this court does not possess jurisdiction which enables it to comply with complainants' request to annul and set aside said report.

P. J. FARRELL,
For Interstate Commerce Commission, Defendant.

In the District Court of the United States for the Southern District of West Virginia.

MOTION THAT THE MOTION TO DISMISS THE ORIGINAL BILL BE TAKEN AS APPLYING TO THE BILL AS AMENDED AND SUPPLEMENTED.

[Title omitted.]

Now comes the Interstate Commerce Commission, one of the defendants in the above-entitled cause, and moves this court that

its motion to dismiss the original bill of complaint herein be taken and considered as a motion to dismiss the bill of complaint herein, as finally amended and supplemented.

J. CARTER FORT,
For the Interstate Commerce Commission.

75 In United States District Court.

ORDER SUSPENDING RULING OF INTERSTATE COMMERCE COMMISSION.

(Entered February 8, 1923.)

[Title omitted.]

This cause having come to be heard on the 6th day of February, 1923, on the prayer for a temporary stay or suspension of the operation of the decision, ruling and order of December 11th, 1922, issued by the Interstate Commerce Commission in the cause before said commission, No. 12083, New River Company et al. vs. The Virginian Railway Company, and No. 12084, New River Company et al. vs. The Chesapeake and Ohio Railway Company, and of rule 4 of Circular CS–31 (revised), as referred to and described in the bill of complaint in this cause, and having, after due notice, been heard by three judges, to wit, Hon. C. A. Woods and Hon. Edmund Waddill, jr., circuit judges, and Hon. Geo. W. McClintic, district judge, duly convened for said hearing, all parties defendant being represented at said hearing by their attorneys; said cause having been heard and having been argued by all parties, all after due notice, and evidence having at said hearing been submitted that irreparable damage would result to the complainants unless the operation of said decision, ruling and order and of said rule 4 were stayed and suspended, which said evidence has been transcribed and identified with reference hereto;

76 It is found, ordered, adjudged and decreed, two of said judges concurring herein as follows:

1. It is found that irreparable damage would result to the complainants unless the operation of said decision, ruling and order and of said rule 4 is suspended and stayed; that the nature of said damage is that unless the operation of said ruling, order and rule 4 is stayed and suspended the transportation facilities for the shipment of coal produced by the complainants will be so reduced that it will be impossible for the complainants to fulfill their deliveries on existing contract obligations for the delivery of coal; that the complainants' labor organization, gradually built up through a period of time, will be disrupted and disorganized; that complainants will suffer injury to the good will of their business and loss of present and future business; that the complainants' plant and equipment will become in part idle; that the returns on the lessened amount of coal

which the complainants will be able to ship will be unable adequately to carry the overhead charges of the complainants' plants and of their business, and that the cost of the coal produced by the complainants will be increased to a large amount per ton.

2. It is ordered, adjudged and decreed, that the operation of said decision, ruling and order of December 11, 1922, of the Interstate Commerce Commission and of rule 4 of Circular CS–31 (revised) be stayed and suspended for a period of sixty days from the date of this order, pending the application for an injunction.

This order shall not become effective until the complainants, or some one of them, *or some one for them*, shall enter into a bond, payable to the United States of America, before the clerk of this court, with proper surety to be approved by the judge thereof, in the penalty of $100,000.00, conditioned according to law.

77 It is ordered that the evidence of S. A. Scott, taken before the court and transcribed by a stenographer, be and the same is here filed as part of the record of this cause.

Enter above order.

GEO. W. MCCLINTIC, *D. J.*
EDMUND WADDILL, JR.,
Judge, Circuit Court.

RICHMOND, VA., *February 8, 1923.*

I dissent; see memorandum to be attached.

C. A. WOODS,
Circuit Judge.

78 In United States District Court.

ORDER SETTING APPLICATION FOR INJUNCTION FOR HEARING.

(Entered February 17, 1923.)

[Title omitted.]

This cause coming on this day to be further heard, and it appearing to the court that a temporary restraining order was entered herein on the 8th day of February, 1923, staying for a period of sixty days from said date the operation of a certain decision and ruling and order of December 11th, 1922, of the Interstate Commerce Commission; and it appearing further that the hearing for an injunction as asked for in this cause should be had as speedily as possible; and it appearing that under the law in such case made and provided that it is necessary for the judge of this court to call to his assistance two other judges, and that in order to obtain the presence of two other judges, one of whom must be a circuit judge, it is convenient to have such hearing for such injunction at Richmond, in the State of Virginia, upon motion of plaintiffs by counsel;

It is therefore ordered that the application for such injunction is set for hearing at 10 o'clock a. m. on the 24th day of February, 1923, in one of the court rooms in the Federal Building in the city

of Richmond, State of Virginia; and that a copy of this order be served upon or accepted by the defendants or their counsel of record as speedily as possible after this date.

79 In United States District Court.

ORDER CONTINUING HEARING.

(Entered February 24, 1923.)

[Title omitted.]

This cause was by order entered herein on the 17th day of February, 1923, set for hearing at Richmond, Virginia, on the 24th day of February, 1923, at the hour of 10 o'clock a. m., and for reasons appearing to the court on that day, after the appearance of counsel representing all the interests therein, it is ordered that said hearing be continued to one of the court rooms in the Federal Building, in the city of Richmond, State of Virginia, on the 30th day of March, 1923.

80 In United States District Court.

ORDER CONTINUING SUSPENSION OF RULING OF INTERSTATE COMMERCE COMMISSION.

(Entered March 30, 1923.)

[Title omitted.]

This cause having come on to be heard on the 30th day of March, 1923, on the complainants' application for a temporary injunction and also on the merits, and it having been moved by the complainants that the temporary stay or suspension of the operation of the decision, ruling and order of December 11, 1922, issued by the Interstate Commerce Commission in the cause before said commission, No. 12083, The New River Company et al. vs. The Virginian Railway Company, and No. 12084, The New River Company et al. vs. The Chesapeake and Ohio Railway Company, and of rule 4 of Circular CS–31, revised, as referred to and described in the bill of complaint in this cause and said motion for continuance of said temporary stay of suspension having, after due notice, been held by three judges, to wit, Hon. C. A. Woods and Hon. Edmund Waddill, jr., circuit judges, and Hon. Geo. W. McClintic, district judge, duly convened for said hearing, all parties being represented at said hearing by their attorneys and evidence having been submitted that irreparable damage would result to the complainants unless said temporary stay or suspension is so continued, which said evidence has been transcribed and identified with reference hereto:

It is found, ordered, adjudged and decreed, two of said judges concurring herein, as follows:

81 1. It is found that irreparable damage would result to the complainants unless said temporary stay or suspension is con-

tinued, as prayed for; that the nature of said damage is that unless said temporary stay or suspension is so continued the transportation facilities for the shipment of coal produced by the complainants will be so reduced that it will be impossible for the complainants to fulfill their deliveries on existing contract obligations for the delivery of coal; that the complainants' labor organization, gradually built up through a period of time, will be disrupted and disorganized; that complainants will suffer injury to the good will of their business and loss of present and future business; that the complainants' plant and equipment will become, in part, idle; that the returns on the lessened amount of coal which the complainants will be able to ship will be unable adequately to carry the overhead charges of complainants' plant and their business, and that the cost of the coal produced by the complainants will be increased to a large amount per ton.

2. It is ordered, adjudged and decreed, that the temporary stay or suspension heretofore granted be continued until the decision of this court upon the complainants' application for a temporary injunction.

It is ordered that the evidence of S. A. Scott, taken before this court and transcribed this 30th day of March, 1923, by a stenographer, and also the evidence of said S. A. Scott, taken on the previous hearing on the granting of a temporary stay or suspension and incorporated as a part of his testimony given on this 30th day of March, 1923, be filed as part of the record in this cause.

Enter above order

EDMUND WADDILL, Jr.,
U. S. Circuit Judge.
GEO. W. MCCLINTIC,
District Judge.

RICHMOND, VA., *March 30, 1923.*

Woods, circuit judge, dissents for reasons heretofore expressed by him.

82 In the United States District Court.

[Title omitted.]

Final order and decree.

Entered Aug. 10, 1923.

This cause came on to be heard on the 30th day of March, 1923, on the prayers and applications of the complainants for a temporary injunction and for a permanent injunction and on the merits of the amended bill and on the supplemental bill and the answers thereto, answers having been filed by all of the parties defendant other than the United States of America and the Interstate Commerce Com-

mission, and the United States of America and Interstate Commerce Commission having stated in open court that they respectively relied upon their motions to dismiss and desire to submit the case without answer or further pleading on behalf of the United States of America and Interstate Commerce Commission and due notice having been given of said hearing on said application for injunctions and on the merits, and said cause having on the evidence submitted been fully heard by three judged, to wit, Hon. C. A. Woods and Hon. Edmund Waddill, jr., circuit judges, and Hon. Geo. W. McClintic, district judge of the District Court of the United States for the Southern District of West Virginia, duly convened for said hearing and having been argued by all parties by their attorneys;

And it appearing (1) that during the period of Federal control of railroads there had been put into effect by the Director General of Railroads a rule of car distribution, known as rule 4 of Circular CS–31, revised, applying to coal mines engaged in the shipment of coal in interstate commerce and served by two or more carriers; (2) that by and pursuant to recommendations of the Interstate Commerce Commission of March 2, 1920, and April 15, 1920, said rule had been kept in force and effect by said carriers until June 21, 1921; (3) that on said date the Interstate Commerce Commission, in a proceeding entitled Fairmont & Cleveland Coal Company et al. vs. Baltimore & Ohio R. R. Co. et al., 66 I. C. C. 269, in which the complainants herein were petitioners and the carriers defendants herein were parties, found and ruled that said rule 4 of Circular CS–31, revised, was unreasonable and unduly prejudicial to mines served in interstate commerce by two or more carriers and that the defendant carriers should for the future distribute cars according to a rule laid down in said decision of June 21, 1921, of the commission as the proper and just rule (to wit, a rule which had been promulgated by the Commission in In re Irregularities in Mine Ratings, 25 I. C. C. 286) and in said decision of June 21, 1921, directed as follows:

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"We shall expect that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us";

(4) that the defendant carriers, pursuant to said finding, decision, and direction so amended their rules and put into effect in place of said rule 4 the rule then directed to be put into effect, known as the Illinois rule;

And it further appearing (5) that subsequently the Interstate Commerce Commission, by its own order, without application of the complainants or carriers defendants herein, and the Illinois rule being still in effect in accordance with the ruling of the commission in the Fairmont case, directed the Fairmont case to be reopened and consolidated with the case known as the Bell & Zoller case; (6) that on December 11, 1922, the commission in said consolidated cases ren-

dered a decision and report in which, in reversal of its previous finding and ruling, it found and ruled:

"The present facts considered, we do not conclude upon these records that the rule attacked, rule 4 of Circular CS–31, re-
84 vised, is in principle unreasonable or unduly prejudicial."

and that—

"Our former conclusions in the Fairmont case, based upon a mistaken adherence to and extension of the decision in the Illinois case, are reversed."

and thereupon entered an order incorporating as a part thereof its decision and report, said order being as follows:

"These cases being at issue upon complaints, answers, and intervening petitions on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

"It is ordered, that the complaints in these proceedings be, and they are hereby, dismissed."

and that by said order so incorporating the findings and conclusions of the commission, rule 4 of Circular CS–31, revised, was again put into effect and made operative and was authorized as the rule of car distribution to be followed by the carriers in lieu of the Illinois rule, and that under and pursuant to said order of December 11, 1922, the carriers herein then published rule 4 effective as of February 1 on defendant, Virginian Railway, and as of February 10, 1923, on defendant, Chesapeake & Ohio Railway, in substitution for the Illinois rule previously put into effect by direction of the commission;

And it further appearing (7) that the complainants are the owners of mines reached and served by each of the defendant carriers in the transportation of coal in interstate commerce; (8) that the defendant carriers are independent and competing carriers; (9) that said order of the commission of December 11, 1922, by which said rule 4 was so again put into effect and authorized was beyond its statutory power and the power which it could constitutionally exercise, and is without warrant of law; that by said order and said rule 4 promulgated and authorized thereby, the complainants are unlawfully deprived and denied lawful rights of transportation, and without due process of law are deprived of and denied property
rights and liberty of contract; that no rule similarly affecting
85 transportation rights has been put into effect by the commission on to any other commodity and that the fact that the commodity to be transported is coal has no bearing on the transportation rights involved; also that the complainants would be irreparably damaged if said order of the commission and said rule 4 are allowed to operate or remain in effect;

It is ordered, adjudged and decreed as follows:

1. That the order of December 11, 1922, of the Interstate Commerce Commission, whereby rule 4 of Circular CS–31, revised, is promulgated and put into effect and authorized is without warrant in law and is null and void.

2. That said order and said rule 4 of Circular CS–31, revised, promulgated, and authorized thereby are hereby set aside and annulled.

3. That the United States of America, the Interstate Commerce Commission and the carriers defendant herein, and each of them, are perpetually restrained and enjoined from restricting, in accordance with said order of December 11, 1922, of the Interstate Commerce Commission, and of rule 4 of Circular CS–31, revised, thereby promulgated and put into effect and authorized, the transportation rights in interstate commerce of the complainants and from so restricting said service by or through any other order or rule to the same effect.

Enter above final order and decree as of the 10th day of August, 1923.

EDMUND WADDILL, JR.,
U. S. Circuit Judge.
GEO. W. MCCLINTIC,
District Judge.

86 In the District Court of the United States for the Southern District of West Virginia.

[Title omitted.]

OPINION.

(Filed August 10, 1923.)

MCCLINTIC, District Judge:

This is a suit in equity, brought under the provisions of the urgent deficiency appropriation act, approved October 22, 1913, found in 38 Statutes L. 219.

This case arises under that part of the act which abolished the Commerce Court, and gave jurisdiction, under certain circumstances, to the District Courts.

When an application is made for an injunction, temporary or permanent, under this act, and the district judge decides that it is a proper case to hear, it becomes his duty to call to his assistance to hear and determine the application, two other judges, one of whom must be a circuit judge.

The bill in this cause was presented to the district judge of the Southern District of West Virginia on the 29th day of January, 1923, and an order was made, filing the bill of complaint, and setting for hearing the application for the temporary restraining order and interlocutory injunction therein prayed for, at the court room of the United States District Court, at Richmond, Virginia, on Tuesday,

February 6, 1923; and further ordered that a copy of the bill be served upon each defendant in said cause.

87 This case came on for hearing before the honorable Charles A. Woods and the honorable Edmund Waddill, jr., circuit judges, and the honorable George W. McClintic, district judge, at Richmond, on the said 6th day of February, 1923.

The defendant, the United States of America, and the defendant, the Interstate Commerce Commission, appeared by counsel, and moved the court to dismiss the bill for want of jurisdiction, and want of equity, for reasons set out in separate written motions, duly filed.

The defendants, the Chesapeake & Ohio Railway Company and the Virginian Railway Company, each appeared by counsel, and filed answers to the bill in this cause.

The Slab Fork Coal Company, and numerous other companies, as intervening defendants, appeared and by leave of court, filed their intervening petition and motion to dismiss, and later filed their answer to the bill of complaint herein.

This cause came on to be heard on the said 6th day of February, 1923, upon the bill and exhibits, upon the motions above set out, and the answers filed, and upon the evidence taken in open court, and a temporary restraining order was entered on the 8th day of February, 1923, staying and suspending the operation of a certain decision, ruling and order of the Interstate Commerce Commission, made on the 11th day of December, 1922, and of rule 4 of Circular CS–31 (revised), for the period of sixty days from said date, pending the application for an injunction.

Later, the bill was amended by leave of court, and the answers of the intervening defendants were also amended by leave of court.

On the 30th day of March, 1923, this cause came on for final hearing before the same judges, and was submitted for decision, and an order was entered continuing the temporary stay and suspension until the final decision upon the application.

88 The bill in this cause was filed by the New River Company and six subsidiary companies, named as plaintiffs. All the stock of the six subsidiary companies is owned by the New River Company, and such companies operate mines situated in Fayette and Raleigh Counties of West Virginia, and in the southern district thereof. Under the designation of the Interstate Commerce Commission, mines in this region are divided into two classes, to wit, "joint mines" and "local mines."

By the designation "joint mines" is meant those mines situated on, and entitled to service from, two or more carriers. By the designation "local mines" there is meant those on, or accessible to, one carrier. In this opinion, they will be so designated for the purpose of convenience.

In this region, there are many mines other than those of the plaintiffs, which are joint mines, and there are many mines which are local mines. The intervening petitioners all own local mines.

The railway companies in this particular case which serve these mines are the Chesapeake & Ohio Railway and the Virginian Railway.

The question which comes up for decision in this case is, whether a joint mine shall be allowed to order such cars as it may need, according to its rated capacity as fixed under the rule, from each railroad, or shall it be allowed only to order such number of cars from both carriers as it would be allowed to order from one carrier.

The history of this question appears from the record in this case to be as follows:

For a period of years prior to the taking of Federal control of railroads, cars were distributed in time of car shortage, to joint mines in the New River fields, by each of the carriers, by what will, for convenience, be referred to as the New River rule; that is, there was no distinction between joint mines and local mines, and cars were distributed to joint mines, according to their proportionate share
89 of the available car supply in that region, as determined by the rated capacity of the shipper, and without reference to, or inquiry into, the car supply furnished by any other railway. The only limitation placed on the mine was, that these orders for cars based on its rating, should not result in a car supply greater than the capacity of the mines to ship. If, in practice, the orders were so placed as to exceed the capacity of the mine to ship, the penalty rule was provided, in order to limit the car supply for its succeeding days, and ultimately, to be reflected in the rated capacity of the mine for the succeeding months.

This rule here described has sometimes been called "the two hundred per cent rule."

By the decision of the Interstate Commerce Commission in the Illinois case (In re Irregularities in Mine Ratings, 25 I. C. C. 286), the commission required that the carrier shall furnish daily to the operators, a statement of the available car supply for the following day. Under the car service rules appended to the bill in this record, the mines place their orders at 4 p. m. on each day for the following day. Where there are two carriers, this rule, known as the Illinois rule, permits the joint mine to order from each carrier, such number of cars as it may need, based on its rated capacity, not to exceed 75 per cent of such rated capacity. This is sometimes called the "one hundred and fifty per cent rule."

When under the law the Government took charge of the railroads, the Director General of Railroads provided for the distribution of cars for mines in accordance with Circular CS–31, rule 4, hereinafter referred to as rule 4. In effect, this rule was, and is, that a joint mine could only order from the carriers one hundred per cent of its rated capacity, and stood in no better position than a local mine; indeed, it was not in so good a position as a local mine, unless it ordered all of its cars from the carrier having the greatest supply of cars on that particular day.

90 This rule 4 continued to be the measure of car distribution so long as Federal control of railroads continued, and there-

after, until the decision of the Interstate Commerce Commission on the 21st day of June, 1921, in the case of Fairmont & Cleveland Coal Company vs. Baltimore & Ohio Railroad Company (62 I. C. C. 629). It was decided by the commission that rule 4 of Circular CS–31, revised, was unreasonable and unduly prejudicial to joint mines, and unduly preferential to local mines, to the extent that it limited the aggregate orders of the joint commission to one hundred per cent of its rated capacity from both roads, and that for the future, during periods of car shortage, the carrier should distribute cars to the joint mines on their lines, considered in that case, on the basis outlined in the Illinois rule, namely, on days when the joint mine orders cars from only one carrier, and on days on which it orders cars from both carriers, its rating on each of such carriers shall be seventy-five per cent of its full rating, subject to the limitation that it shall on no day be supplied with cars in excess of its maximum rating; and that information should be exchanged between carriers, showing the left-over cars, in order to prevent any abuses that might come therefrom.

This rule then continued in force until a decision was entered by the Interstate Commerce Commission on the 11th day of December, 1922, in the case of Bell & Zoller Coal Company et al. vs. Baltimore & Ohio Southwestern Railroad Company et al., wherein an order was entered and an opinion filed, reversing the opinion in the Fairmont case, supra, and again putting into effect rule 4 of Circular CS–31, revised.

Following this decision, the carriers, the Cheapeake & Ohio Railway Company, and the Virginian Railway Company, arranged to put into effect said rule 4, the one on the first day of February, 1923, and the other on the 10th day of February, 1923.

This suit was instituted to enjoin such acts on the part of the
91 carriers, and action was taken therein as above set forth, relative to the temporary restraining order.

The question is raised whether this court has any jurisdiction. It is claimed that it has none, on the ground that the decision of the Interstate Commerce Commission is negative, and no appeal can be taken therefrom, under the ruling of the Supreme Court in the case of Proctor & Gamble Company vs. United States 225 (U. S. 286).

This question is raised by the motions to dismiss, filed by the United States and Interstate Commerce Commission, and by intervening defendants.

Without going into a full discussion thereof, we are of opinion that the decision of the Interstate Commerce Commission was in substance and effect affirmative, and that the carriers so understood it, and acted upon it, as an affirmative order, and in consequence thereof, took affirmative action; and the results, so far as the rights claimed by the plaintiffs were concerned, was the same as if the

order had been affirmative in form. It is a case in which we must deal with the substance and not the form.

We are therefore of opinion that the Proctor & Gamble case, and other cases of like nature, do not apply here, and that this court has jurisdiction to pass upon the questions raised by the pleadings.

The facts developed by the evidence show very large expenditures made by its plaintiffs, for the purpose of shipping coal by the two carriers. It is also shown, that the shortage of cars on each carrier continues most of the time, and that the right to ship coal by each carrier, is a valuable property right. If the right to ship by each carrier, and to receive cars from each carrier, on the basis of rated capacity, is denied to the plaintiffs, and to other shippers in like condition, the financial loss will be very great, and the value of their properties will be greatly depreciated. Much larger prices have been paid for mines which had access to the lines of two carriers, than would be thought of, for similar mines, with access only
92 to the line of one carrier. When there is any real market for coal, car shortage has always existed, and so far as can be foreseen, will always exist. This case would not have arisen if each carrier had always on hand a sufficient supply of cars, to take care of the demands of each shipper.

The shipper of any commodity who has access to more than one carrier, has a right to choose one carrier, or to divide his goods among 2 or more carriers, with the advantages naturally belonging to such location, giving such access; and while the Interstate Commerce Commission has, under the law, certain powers of regulation, yet it is beyond such powers to deprive the shipper of such right, under the guise of regulation, or to limit such right in such way as to amount to the deprivation thereof.

From the adjudged cases, it is plainly to be seen, that the Interstate Commerce Commission has no authority to so exercise its powers so arbitrarily as virtually to transcend such authority conferred, although it may be not technically doing so.

Proctor & Gamble Co. vs. United States, supra.

A so-called regulation which destroys at least thirty per cent of the market value of a coal property, certainly transcends such authority. It is a taking of private property without due process of law, by depriving the owner of the power to use it in a legitimate and proper way, for the commercial purpose for which it was designed and developed, by the large extra expenditures of money as shown by the evidence in this cause.

Of course a commercial advantage will accrue to the joint mine, over the local mine, by the abrogation of rule 4, but in our opinion, that advantage constitutionally belongs to it, by reason of its location, and one that the Interstate Commerce Commission can not order the carriers to take away from it, and one of which the carrier cannot legally deprive it.

A question analogous to this was before a three judge court in Pennsylvania recently, in the case of the Pennsylvania Railroad
93 Company vs. United States, and the court therein decided, that the order of the Interstate Commerce Commission was erroneous, and the same was enjoined and suspended.

Davis, circuit judge, in the opinion of the court, in deciding that the industries, situated in a certain zone, where they had access to two carriers, were entitled to such advantage over those out of the zone, and on the line of one carrier, said:

"It has been repeatedly held that where one company serves a community or industry located on the tracks of another under a trackage arrangement, the situation in effect is the same as if the former company had extended its own tracks to such community or industry. (Commercial Club of Superior, Wis., vs. Great Northern Railway, 24 I. C. C. 96; Penick & Ford v. Director General, 61 I. C. C. 173; Louisville & Nashville Railroad vs. United States et al., 242 U. S. 60.) The industries, therefore, located along the tracks of either company in the zone are in law to be considered as on the individual tracks of both companies, and the industries beyond this zone as located on the tracks of one of the companies only. Consequently, in legal effect, these industries which are within the zone and those without the zone are not similarly situated, but are in a substantially different position. And so the advantage enjoyed by the industries within the zone over those without the zone is not, within the meaning of the act, an undue or unreasonable preference. (Ridge Coal Mining Co. v. Missouri Pacific R. R. Co., 62 I. C. C. 259; Dering Mines Co. et al. vs. Director General, 62 I. C. C. 265; Louis-
94 ville & Nashville Railroad Company, et al. vs. United States et al., supra.) 'A carrier must use its existing facilities impartially,' and the railroads, under the facts in this case, are under no obligation to extend or curtail their facilities. The legal position of the industries in the zone is just the same as though they were located at some other part of the city away from the tracks. An industry selecting a disadvantageous location for reasons justifiable to itself has no right to call upon the carriers to overcome such disadvantage at their expense and this is what the industries outside of the zone, so far as the legal situation is concerned, did."

We mean only to hold that Circular CS–31, rule 4 (revised), and the action of the carriers in putting it in force, is erroneous, and must be enjoined and suspended.

The order will be entered without prejudice to the Interstate Commerce Commission making proper orders relative to reasonable car distribution, to joint as well as local mines, not in conflict with the views hereinbefore expressed.

(Endorsed.)

I concur,

EDMUND WADDILL, Jr.,
U. S. Circuit Judge.

[File endorsement omitted.]

95 In the District Court of the United States for the Southern District of West Virginia.

[Title omitted.]

DISSENTING OPINION.

(Filed August 10, 1923.)

Woods, Circuit Judge, dissenting:

The rule for distribution of cars to coal mines other than anthracite mines, in time of shortage, established while the railroads were under Government control, was as follows:

"Copies of orders for cars for a mine that is joint with any other carrier (steam, electric, or water) shall be filed with the designated representative of each such carrier, such combinations of orders must not exceed the gross daily rating of the mine."

Joint mines are those served by two or more carriers. Local mines are those served by only one carrier. The rule meant that in car distribution joint mines were to be rated on the same basis as local mines; that is, they were to have no advantage by reason of the double service. After release of the railroads from Federal control the Interstate Commerce Commission recommended that carriers continue the rule in force "until such time as the experience of the carrier or the commission should dictate other and more appropriate rules for the rating and distribution of cars to coal mines."

96 On January 11, 1921, the complainants in this case filed complaints before the Interstate Commerce Commission against the Chesapeake and Ohio Railway Company and the Virginian Railway Company alleging the rule hereinbefore quoted, now known as rule 4 of Circular CS-31, to be unduly preferential to complainants' competitors, the local mines. These cases before the Interstate Commerce Commission, known as Nos. 12083 and 12084, were consolidated with Nos. 12081 and 12082, similar in character. After hearing, the commission found rule 4 to be unjustly and unreasonably favorable to local mines; and further found that the joint mines should have a rating in car distribution in the proportion of 150 per cent for the joint mines to 100 per cent for the local mines. That is, the joint mines might have 75 per cent on each carrier as against 100 per cent to the local mines on one carrier. At the conclusion of the opinion the commission said:

"We have not required that car service rules be filed as tariff schedules. We will not in this proceeding direct that the rules which we herein find to be reasonable be so filed. We shall expect, however, that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us."

No order was made by the commission. Similar complaints by coal operators in Indiana and Illinois had been filed before the commission, known as Bell & Zoller Coal Company et al. *v.* Baltimore & Ohio Southwestern Railroad Company et al., Nos. 12362 and

12399. While these last complaints were pending a petition was filed before the Interstate Commerce Commission by the owners coal operators in Indiana and Illinois had been filed before the com- of local mines concerned to reopen the former holding of the commission in Nos. 12083 and 12084 that the 150 per cent rule in favor of joint mines was just and reasonable. The cases were con-
97 solidated. After full hearing of evidence and argument, the commission reversed its former conclusions and found that rule 4—the equality rule without regard to whether a mine was served by one road or more—was just and reasonable. The complaints of the owners of all the joint mines, including those of the complainants in this suit, were dismissed by the following order:

"These cases being at issue upon complaints, answers, and intervening petitions on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"It is ordered, that the complaints in these proceedings be, and they are hereby, dismissed."

There was never any order or even final determination of the commission to put into effect any rule or to interfere with rule 4 of the railroads. The conclusions announced in its opinion were reopened, reconsidered, and changed; but all this was done in one consolidated proceeding, which was never ended until the commission made the order above quoted. This last order was a final dismissal of the complaints and a refusal to take any action with respect to rule 4 of the railroads. It was, therefore, a negative order—a mere refusal to interfere with an existing rule. As such it was not reviewable by this court. (Proctor & Gamble v. United States, 225 U. S. 282.) The action of the Interstate Commerce Commission in the case cited had more the semblance of affirmative action than in this, for there Proctor & Gamble asked the revocation or modification of a rule expressly approved by the commission, while here, in a continuous proceeding, the commission merely reached the ultimate conclusion that it would not interfere with an existing rule of the
98 railroads. I therefore think the court had no jurisdiction whatever to enjoin the railroads from operating under rule 4 as a rule established by affirmative action of the Interstate Commerce Commission.

Even, however, if rule 4 had been adopted and put into effect by the Interstate Commerce Commission, it seems to me perfectly clear that this court has no power to change it. It it apparent from the above statement that the Interstate Commerce Commission has devoted much time and care to the consideration of the justness and reasonableness of the rule. To say the least, it cannot be doubted that the whole matter is debatable and that there are very

strong reasons in favor of rule 4 as distinguished from the 150 per cent rule claimed by the complainants. Even if this court entertains the opinion that the action of the commission was unwise and improper, that affords no ground to say that a prima facie case for an injunction has been made out. (Interstate Commerce Commission v. Illinois Cent. R. R., 215 U. S. 452, 478, 30 Sup. Ct. 155, 54 L. Ed. 280; Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Manufacturers' Ry. Co. v. United States, 246 U. S. 457; Skinner & Eddy Corporation v. United States, 249 U. S. 557, 562; Seaboard Air Line Ry. Co. v. United States, 254 U. S. 57, 62; Akron, Canton & Youngstown Ry. Co. v. United States, — U. S. — decided February 19, 1923.) The authority of this court is "confined to determining whether there had been violations of the Constitution, or of the proper conferred by statute, or an exercise of power so arbitrary as virtually to transcend the authority conferred. (Interstate Commerce Commission v. Illinois Central R. Co., 215 U. S. 452, 470; Interstate Commerce Commission v. Union Pacific R. Co., 222 U. S. 541, 547; Proctor & Gamble v. United States, 225 U. S. 282, 297; Interstate Commerce Commission v. Baltimore & Ohio R. Co., 225 U. S. 326, 340.)" (Kansas City So. Ry. v. United States, 231 U. S. 439, 440.)

There is no ground for the argument that the refusal of the Interstate Commerce Commission to set aside rule 4 is an in-
99 vasion of any constitutional right of the plaintiffs. (Akron Canton & Youngstown Ry. Co. v. United States, — U. S. —, decided Feb. 19, 1923.) The court has no power under the statute to regulate interstate commerce; it can only interfere with the action of the Interstate Commerce Commission when the commission has taken affirmative action contrary to the Constitution or the statute, or has taken such arbitrary action as to virtually transcend its authority. To grant the injunction on this debatable question seems to me to be setting up the judgment of the court upon a question of fact against the findings of the Interstate Commerce Commission. and that is beyond the power of the court.

[File endorsement omitted.]

100 In the District Court of the United States for the Southern District of West Virginia.

[Title omitted.]

PETITION FOR APPEAL BY UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION.

(Filed October 6, 1923.)

United States of America and Interstate Commerce Commission, defendants, feeling themselves aggrieved by the final order or decree of the District Court made and entered August 10, 1923, pray an appeal to the Supreme Court of the United States therefrom.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

Defendants pray that a transcript of the record, proceedings, and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

ELLIOT NORTHCOTT,
United States Attorney,
Southern District of West Virginia.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
J. CARTER FORT,
Solicitor for the Interstate Commerce Commission.

101 [File endorsement omitted.]

In the District Court of the United States for the Southern District of West Virginia.

[Title omitted.]

ASSIGNMENT OF ERRORS BY AND ON BEHALF OF THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

(Filed October 6, 1923.)

United States of America and Interstate Commerce Commission, defendants, now come by their respective counsel, and in connection with their petition for appeal, file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the final order or decree of the District Court entered August 10, 1923.

The District Court erred:

I. In denying the motion of the United States to dismiss the bill of complaint and in not sustaining the motion.

II. In denying the motion of the Interstate Commerce Commission to dismiss the bill of complaint and in not sustaining the motion.

102 III. In ordering, adjudging and decreeing that the order of December 11, 1922, of the Interstate Commerce Commission, be set aside and annulled.

IV. In ordering, adjudging, and decreeing that rule 4 of Circular CS–31, revised, be set aside and annulled.

V. In perpetually enjoining the United States of America, Interstate Commerce Commission, and the defendant railroad companies, from—

"restricting, in accordance with said order of December 11, 1922, of the Interstate Commerce Commission, and of rule 4 of Circular CS–31, revised, thereby promulgated and put in effect and author-

ized, the transportation rights in interstate commerce of the complainants and from so restricting said service by or through any other order or rule to the same effect."

VI. In holding that the order of December 11, 1922, of the Interstate Commerce Commission, is an affirmative order.

VII. In holding that the court had jurisdiction of the subject matter of this suit.

VIII. In holding that the order of the Interstate Commerce Commission resulted in a taking of private property without due process of law.

IX. In holding that the Interstate Commerce Commission required the defendant carriers to put into effect Circular CS–31, rule 4, revised.

X. In holding that the Interstate Commerce Commission was without power to require defendant carriers to put in force and effect Circular CS–31, rule 4, revised.

XI. In substituting its judgment for the judgment of the Interstate Commerce Commission concerning a regulation pertaining to the distribution of cars for the transportation of coal in interstate commerce.

XII. In making and entering a final order or decree in
103 violation of equity rule 71 by reciting and stating therein (a) prior proceedings before the United States Railroad Administration during the period of Federal control and (b) prior proceedings before the Interstate Commerce Commission, and by further including therein a special finding of facts.

Wherefore, defendants, and each of them, pray that the final order or decree of the District Court may be reversed, annulled, and set aside, with directions that the permanent injunction shall be dissolved and the bill of complaint dismissed, and for such other and further order as may be appropriate.

ELLIOTT NORTHCOTT,
United States Attorney,
Southern District of West Virginia.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
J. CARTER FORT,
Solictor for the Interstate Commerce Commission.

[File endorsement omitted.]

104 In the District Court of the United States for the Southern District of West Virginia.

[Title omitted.]

ORDER ALLOWING APPEAL OF UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

In the above-entitled cause, United States of America and Interstate Commerce Commission, defendants, having made and filed

their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and citation made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings and papers on which said order or decree was made and entered to the Supreme Court of the United States.

EDMUND WADDILL, Jr.,
United States Circuit Judge.
GEO. W. MCCLINTIC.
United States District Judge.

105 Citation on appeal (filed October 6, 1923). [Omitted in printing.]

106 (Acceptance of service.)

Service of the foregoing citation and the receipt of a copy thereof is hereby acknowledged this 9th day of October, 1923.

JAMES W. CARMALT,
Solicitors for all Appellees.

[File endorsement omitted.]

107 In the District Court of the United States for the Southern District of West Virginia.

[Title omitted.]

NOTICE OF THE APPEAL OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION.

(Filed October 6, 1923.)

To The Chesepeake and Ohio Railway Company and The Virginian Railway Company, defendants, and Slab Fork Coal Company, Scotia Coal & Coke Company, South Side Company, Turkey Knob Coal Company, Coal Run Coal Company, Branch Coal Company, Beechwood Coal and Coke Company, Greenwood Coal Company, Laurel Creek Coal Company, Quinnimont Coal Company, Maryland-New River Coal Company, Star Coal & Coke Company, Ephriam Creek Coal & Coke Company, Stover Coal Company, Intervenors:

You are hereby notified that the United States of America and the Interstate Commerce Commission will prosecute an appeal from the final order or decree of the District Court, entered August 10, 1923, in the above-entitled cause, in which you are parties defendants and intervenors, respectively, to the Supreme Court of the United States, to reverse the decree rendered in the said cause. This notice is

seasonably given that you may have full opportunity to de-
108 termine your own course with respect to appeals.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

Service of a true copy of the foregoing notice is hereby acknowledged this fifth day of October, A. D. 1923.

W. S. BRONSON,
SHERLOCK BRONSON,
Solicitors for the Chesapeake & Ohio Railway Company.
WILLIAM LOYALL &
TIM FALL,
Solicitors for the Virginian Railway Company.
GEO. T. BELL,
Solicitors for the foregoing intervenors.

[File endorsement omitted.]

109 In United States District Court.

[Title omitted].

(Filed October 6, 1923.)

NOTICE OF APPEAL.

To the honorable E. D. ENGLAND,
Attorney General of the State of West Virginia.

You are hereby notified that the defendants above named have taken an appeal from the final decree of the District Court to the Supreme Court of the United States and that the order allowing the appeal makes the same returnable within thirty (30) days from the date of the order.

This notice is given you pursuant to urgent deficiencies act, October 22, 1913 (38 Stat. 221).

ELLIOTT NORTHCOTT,
United States Attorney,
Southern District of West Virginia.

OCTOBER 5, 1923.

I hereby acknowledge receipt of a copy of the above notice this 5th day of October, A. D. 1923.

E. T. ENGLAND,
Attorney General of the State of West Virginia.

110 Marshal's Return.

Received this writ at Charleston, W. Va., Oct. 4, 1923, and served same on E. T. England at Charleston, W. Va., Oct. 5, 1923, by delivering a true copy of this writ to his person as within I am commanded.

SIEGEL WORKMAN, *U. S. Marshal,*
By O. W. MARTIN, *Dept.*

[File endorsement omitted.]

111 In the District Court of the United States for the Southern District of West Virginia.

[Title omitted.]

PRÆCIPE FOR TRANSCRIPT OF RECORD.

(Filed October 6, 1923.)

To the Clerk:

Please prepare a transcript of the record in the above-entitled cause in the matter of an appeal of the United States of America and Interstate Commerce Commission and include therein, in the order given below, the following matter, viz:

1. Bill of complaint, as amended, and supplemental bill.
2. Motion of the United States to dismiss.
3. Motion of the Interstate Commerce Commission to dismiss.
4. Interlocutory decree.
5. Dissenting opinion of Circuit Judge Woods.
6. All orders and journal entries in their appropriate order.
7. Opinion of the court by District Judge McClintic.
8. Final decree entered August 10, 1923.
9. Petition for appeal.
10. Assignment of errors.
11. Order allowing appeal.
12. Citation.
13. Notice of appeal to defendants and intervenors.
14. Notice of appeal to Attorney General of West Virginia.
15. Præcipe for record.

ELLIOTT NORTHCOTT,
United States Attorney,
Southern District of West Virginia.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
J. CARTER FORT,
Solicitor for Interstate Commerce Commission.

112 Service of a copy of the within præcipe for record is hereby admitted and acknowledged this 9th day of October A. D., 1923.

JAMES W. CARMALT,
Solicitor for all Appellees.

[File endorsement omitted.]

113 In United States District Court.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Southern District of West Virginia, ss:

I, Ira H. Mottesheard, clerk of the District Court of the United States for the Southern District of West Virginia, do certify that

the foregoing is a true and correct transcript of the record and proceedings, as indicated and called for by the præcipe on appeal filed by the United States and the Interstate Commerce Commission, in the case of The New River Company et al. vs. Chesapeake & Ohio Railway Company et al. and now of record and on file in my office.

In testimony whereof I hereto set my hand and the seal of said court, at Charleston, in said district, this 29th day of October, A. D., 1923, and in the 148th year of the independence of the United States of America.

[SEAL.]

IRA H. MOTTESHEARD,
Clerk, D. C., U. S. S. D., W. Va.

[Endorsement on cover:] File No. 29937. S. West Virginia, D. C., U. S. Term No. 627. The United States of America and Interstate Commerce Commission, appellants, vs. The New River Company, White Oak Fuel Company, Stuart Colliery Company, et al. Filed November 6th, 1923. File No. 29937.